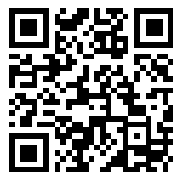


---

This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

Google<sup>TM</sup> books

<https://books.google.com>



OFFICIAL OPINIONS  
OF  
THE ATTORNEYS GENERAL  
OF  
THE UNITED STATES  
ADVISING THE  
PRESIDENT AND HEADS OF DEPARTMENTS  
IN RELATION TO  
THEIR OFFICIAL DUTIES

---

EDITED BY  
GEORGE KEARNEY

---

VOLUME 29

WASHINGTON  
1913



---

---

VOLUME 29.

---

CONTAINING

THE OPINIONS OF THE ATTORNEY GENERAL

HON. GEORGE W. WICKERSHAM,  
Of New York.

---

ALSO CONTAINING OPINIONS BY SOLICITOR GENERAL

HON. F. W. LEHMANN, of Missouri,

AND

ACTING ATTORNEYS GENERAL

HON. J. A. FOWLER,  
HON. WILLIAM R. HARR,  
HON. WINFRED T. DENISON,  
HON. ERNEST KNAEBEL,  
HON. JESSE C. ADKINS.

---

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE REVISED  
STATUTES, THE CONSTITUTION, TREATIES AND CONVENTIONS,  
OPINIONS OF ATTORNEYS GENERAL, AN INDEX  
TO SUBJECTS, AND AN INDEX-DIGEST.

---

---





# ACTS AND RESOLUTIONS OF CONGRESS CITED OR REFERRED TO IN THIS VOLUME.

[Where an act or resolution is cited or referred to twice in same opinion, the first citation  
or reference only is indicated.]

|                                                     | Page.         |
|-----------------------------------------------------|---------------|
| 1789, Sept. 1, ch. 11 (1 Stat. 55).....             | 189           |
| 1790, July 16, ch. 28 (1 Stat. 130).....            | 1, 3          |
| 1792, Dec. 31, ch. 1 (1 Stat. 287).....             | 189           |
| sec. 4 (1 Stat. 289).....                           | 191           |
| 1793, Feb. 18, ch. 7 (1 Stat. 305).....             | 189           |
| 1794, Mar. 22, ch. 11, sec. 3 (1 Stat. 349).....    | 367           |
| 1797, Mar. 3, ch. 13, sec. 1 (1 Stat. 506).....     | 263           |
| 1812, July 6, ch. 129, sec. 1 (2 Stat. 778).....    | 367           |
| 1818, Apr. 20, ch. 88, sec. 11 (3 Stat. 450).....   | 367           |
| 1825, Mar. 3, ch. 99, secs. 1-5 (4 Stat. 129).....  | 190           |
| sec. 5 (4 Stat. 129).....                           | 193           |
| 1832, May 31, ch. 112, sec. 1 (4 Stat. 520).....    | 9             |
| 1834, June 30, ch. 161 (4 Stat. 729).....           | 242           |
| 1838, Apr. 20, ch. 57 (5 Stat. 226).....            | 9             |
| 1848, Aug. 14, ch. 177, sec. 5 (9 Stat. 325).....   | 299           |
| 1853, Mar. 2, ch. 90, sec. 5 (10 Stat. 174).....    | 299           |
| 1858, June 11, ch. 145 (11 Stat. 313).....          | 190, 193      |
| 1862, May 20, ch. 81, sec. 1 (12 Stat. 404).....    | 367           |
| 1862, June 2, ch. 93 (12 Stat. 411).....            | 296           |
| 1863, Mar. 3, ch. 115 (12 Stat. 807).....           | 10            |
| 1864, June 11, ch. 119 (13 Stat. 123).....          | 399           |
| 1864, July 2, ch. 217, sec. 3 (13 Stat. 367).....   | 499           |
| 1865, Mar. 3, ch. 78, sec. 7 (13 Stat. 484).....    | 96            |
| 1866, July 27, ch. 278 (14 Stat. 292).....          | 124, 131      |
| sec. 3 (14 Stat. 295).....                          | 124, 126, 128 |
| sec. 6 (14 Stat. 296).....                          | 128           |
| sec. 18 (14 Stat. 297).....                         | 124, 125      |
| 1867, Mar. 2, ch. 167 (14 Stat. 466).....           | 13            |
| 1868, June 25, ch. 72 (15 Stat. 77).....            | 372, 481      |
| 1870, July 15, ch. 294 (16 Stat. 315).....          | 402           |
| (16 Stat. 319).....                                 | 298           |
| 1871, Feb. 28, ch. 100, sec. 14 (16 Stat. 446)..... | 153           |
| sec. 64 (16 Stat. 458).....                         | 152           |
| 1874, Apr. 20, ch. 117 (18 Stat. 33).....           | 251           |
| 1874, June 20, ch. 344, sec. 7 (18 Stat. 127).....  | 73            |
| 1875, Feb. 18, ch. 80 (18 Stat. 317).....           | 559           |
| 1875, Feb. 19, ch. 89 (18 Stat. 329).....           | 558           |

|                                                        | Page.    |
|--------------------------------------------------------|----------|
| 1875, Mar. 3, ch. 130 (18 Stat. 371, 377).....         | 288      |
| (18 Stat. 372).....                                    | 48       |
| 1875, Mar. 3, ch. 134 (18 Stat. 458).....              | 50       |
| 1875, Mar. 3, ch. 156, sec. 3 (18 Stat. 485).....      | 584      |
| 1876, June 26 (19 Stat. 664).....                      | 53       |
| 1877, Feb. 27, ch. 69 (19 Stat. 252).....              | 170      |
| 1877, Mar. 3, ch. 107 (19 Stat. 377).....              | 441      |
| 1878, Apr. 10, ch. 58 (20 Stat. 36).....               | 162      |
| 1878, June 11, ch. 180 (20 Stat. 102).....             | 411, 412 |
| 1878, June 18, ch. 263 (20 Stat. 150).....             | 250      |
| 1878, June 18, ch. 265 (20 Stat. 163).....             | 48, 49   |
| sec. 12 (20 Stat. 165).....                            | 73, 76   |
| 1878, June 19, ch. 312 (20 Stat. 167).....             | 346      |
| 1879, Mar. 3, ch. 180 (20 Stat. 355).....              | 530      |
| 1880, Apr. 16 (21 Stat. 304).....                      | 54       |
| 1881, Feb. 8, ch. 34 (21 Stat. 322).....               | 365      |
| 1882, May 4, ch. 117 (22 Stat. 55, 57).....            | 73       |
| 1882, June 30, ch. 254 (22 Stat. 118).....             | 250      |
| 1882, July 12, ch. 290, sec. 3 (22 Stat. 163).....     | 558      |
| sec. 9 (22 Stat. 164).....                             | 95       |
| 1882, Aug. 7, ch. 441 (22 Stat. 346).....              | 20, 22   |
| 1883, Jan. 16, ch. 27, sec. 2 (22 Stat. 403).....      | 411      |
| sec. 6 (22 Stat. 405).....                             | 410, 411 |
| secs. 12-14 (22 Stat. 407).....                        | 411      |
| 1883, Mar. 3, ch. 93 (22 Stat. 457).....               | 250      |
| 1883, Mar. 3, ch. 120 (22 Stat. 487).....              | 162      |
| 1883, Mar. 3, ch. 123, sec. 2 (22 Stat. 527).....      | 329, 330 |
| 1883, Mar. 3, ch. 128 (22 Stat. 563).....              | 486      |
| 1883, Mar. 3, ch. 134 (22 Stat. 567).....              | 300      |
| 1884, May 29, ch. 60 (23 Stat. 31).....                | 356      |
| 1884, June 26, ch. 121, sec. 2 (23 Stat. 54).....      | 56       |
| 1884, June 27, ch. 126 (23 Stat. 60).....              | 487      |
| 1885, Feb. 14, ch. 67 (23 Stat. 305).....              | 250      |
| 1885, Mar. 3, ch. 338, sec. 2 (23 Stat. 353, 356)..... | 407      |
| 1885, Mar. 3, ch. 342 (23 Stat. 385).....              | 530      |
| 1885, Jan. 6 (23 Stat. 516).....                       | 54       |
| 1886, May 1, ch. 73, sec. 1 (24 Stat. 18).....         | 95       |
| sec. 2 (24 Stat. 18).....                              | 95       |
| 1886, June 19, ch. 421, sec. 7 (24 Stat. 81).....      | 572      |
| sec. 8 (24 Stat. 81).....                              | 318, 319 |
| 1887, Feb. 8, ch. 119 (24 Stat. 388).....              | 241      |
| sec. 1 (24 Stat. 388).....                             | 242      |
| sec. 5 (24 Stat. 389).....                             | 242      |
| 1887, Feb. 23, ch. 210 (24 Stat. 409).....             | 612      |
| 1887, Feb. 23 (24 Stat. 644).....                      | 54       |
| 1888, Mar. 30, ch. 47 (25 Stat. 57).....               | 372      |
| 1888, May 24, ch. 308 (25 Stat. 157).....              | 372      |
| 1889, Jan. 4, ch. 19 (25 Stat. 639).....               | 288      |

*Acts of Congress Cited.*

VII

|                                                        | Page.                             |
|--------------------------------------------------------|-----------------------------------|
| 1889, Jan. 14, ch. 24 (25 Stat. 642).....              | 455                               |
| secs. 4-7 (25 Stat. 643).....                          | 456                               |
| 1889, Mar. 2, ch. 371 (25 Stat. 817, 818).....         | 349                               |
| 1889, Mar. 2, ch. 411, sec. 4 (25 Stat. 980).....      | 54                                |
| 1890, June 10, ch. 407, sec. 7 (26 Stat. 134).....     | 264                               |
| 1890, June 13, ch. 423 (26 Stat. 148, 151).....        | 251                               |
| 1890, June 30, ch. 640 (26 Stat. 197).....             | 349                               |
| 1890, July 2, ch. 647 (26 Stat. 209).....              | 160                               |
| 1890, Aug. 28, ch. 812 (26 Stat. 362).....             | 487                               |
| 1890, Aug. 30, ch. 839 (26 Stat. 414).....             | 356                               |
| 1890, Sept. 19, ch. 907, secs. 4-5 (26 Stat. 453)..... | 149                               |
| sec. 7 (26 Stat. 454).....                             | 140, 149                          |
| sec. 10 (26 Stat. 454).....                            | 146                               |
| 1890, Sept. 30, ch. 1125 (26 Stat. 504).....           | 250                               |
| 1890, Oct. 1, ch. 1241, sec. 1 (26 Stat. 562).....     | 255                               |
| sec. 3 (26 Stat. 562).....                             | 255                               |
| 1890, Oct. 1, ch. 1244 (26 Stat. 567, 568).....        | 612                               |
| sec. 36 (26 Stat. 220).....                            | 108, 612                          |
| sec. 37 (26 Stat. 620).....                            | 108                               |
| sec. 38 (26 Stat. 621).....                            | 109, 612                          |
| sec. 39 (26 Stat. 621).....                            | 109                               |
| sec. 40 (26 Stat. 621).....                            | 109, 612                          |
| 1890, Oct. 1, ch. 1260 (26 Stat. 648).....             | 487                               |
| 1891, Feb. 24, ch. 284 (26 Stat. 770, 773).....        | 251                               |
| 1891, Mar. 2, ch. 494 (26 Stat. 807).....              | 349                               |
| 1891, Mar. 3, ch. 519 (26 Stat. 830).....              | 194, 195, 389                     |
| sec. 1 (26 Stat. 830).....                             | 198, 389, 391                     |
| sec. 2 (26 Stat. 831).....                             | 198, 391, 393                     |
| sec. 5 (26 Stat. 832).....                             | 392, 393                          |
| 1891, Mar. 3, ch. 555 (26 Stat. 1089).....             | 357                               |
| 1891, Mar. 3, ch. 561 (26 Stat. 1095).....             | 441                               |
| sec. 18 (26 Stat. 1101).....                           | 312                               |
| 1892, May 10, ch. 63 (27 Stat. 27).....                | 191                               |
| 1892, May 12, ch. 71 (27 Stat. 33).....                | 97                                |
| 1892, July 16, ch. 195 (27 Stat. 176).....             | 251                               |
| 1892, Aug. 1, ch. 352 (27 Stat. 340).....              | 284, 372, 395, 481, 492, 508, 584 |
| 1893, Feb. 15, ch. 114 (27 Stat. 449).....             | 172                               |
| sec. 2 (27 Stat. 450).....                             | 169, 172                          |
| sec. 3 (27 Stat. 450).....                             | 172                               |
| sec. 5 (27 Stat. 451).....                             | 172                               |
| 1893, Feb. 15, ch. 117 (27 Stat. 455).....             | 572                               |
| 1893, Feb. 20, ch. 147 (27 Stat. 469).....             | 242                               |
| 1893, Mar. 3, ch. 211 (27 Stat. 715).....              | 484                               |
| 1893, Mar. 3, ch. 212 (27 Stat. 723).....              | 348, 352                          |
| 1893, Aug. 19 (28 Stat. 1222, 1229).....               | 451                               |
| 1894, May 4, ch. 68 (28 Stat. 71).....                 | 451                               |
| 1894, July 31, ch. 174, sec. 2 (28 Stat. 205).....     | 504                               |
| sec. 5 (28 Stat. 206).....                             | 34                                |

|                                                     | Page.                   |
|-----------------------------------------------------|-------------------------|
| 1894, Aug. 13, ch. 280 (28 Stat. 278).....          | 396                     |
| 1894, Aug. 18, ch. 301, sec. 4 (28 Stat. 422).....  | 438                     |
| 1894, Aug. 27, ch. 349, sec. 27 (28 Stat. 553)..... | 218                     |
| 1894, Dec. 15, ch. 7 (28 Stat. 595).....            | 171                     |
| 1895, Jan. 12, ch. 23 (28 Stat. 601).....           | 211                     |
| sec. 20 (28 Stat. 603).....                         | 210, 211, 212, 216, 217 |
| sec. 36 (28 Stat. 606).....                         | 210, 211, 216, 217      |
| sec. 44 (28 Stat. 607).....                         | 212, 213                |
| 1895, Feb. 26, ch. 131 (28 Stat. 683).....          | 499                     |
| 1895, Mar. 2, ch. 188 (28 Stat. 894).....           | 243                     |
| 1896, Mar. 2, ch. 37 (29 Stat. 39).....             | 151, 171                |
| 1896, May 28, ch. 255 (29 Stat. 188).....           | 189, 191                |
| 1896, June 3, ch. 314 (29 Stat. 202, 228).....      | 146                     |
| 1896, June 10, ch. 398 (29 Stat. 358).....          | 243                     |
| 1896, June 10, ch. 399 (29 Stat. 361).....          | 45                      |
| 1897, Jan. 18, ch. 61 (29 Stat. 489).....           | 113                     |
| 1897, Jan. 21, ch. 83 (29 Stat. 494).....           | 72, 74, 75              |
| 1897, Jan. 30, ch. 109 (29 Stat. 506).....          | 226                     |
| 1897, Feb. 19, ch. 265 (29 Stat. 545).....          | 525                     |
| 1897, Mar. 3, ch. 394 (29 Stat. 695).....           | 613                     |
| 1897, June 4, ch. 2 (30 Stat. 35).....              | 246                     |
| 1897, July 24, ch. 11 (30 Stat. 211).....           | 264                     |
| 1898, Feb. 17, ch. 26 (30 Stat. 248).....           | 572                     |
| sec. 2 (30 Stat. 248).....                          | 318, 319                |
| 1898, Mar. 15, ch. 68 (30 Stat. 316).....           | 481                     |
| sec. 7 (30 Stat. 316, 317).....                     | 484, 486                |
| sec. 11 (30 Stat. 318).....                         | 484                     |
| 1898, Mar. 15, ch. 69 (30 Stat. 318, 323).....      | 51                      |
| 1898, June 13, ch. 448, sec. 27 (30 Stat. 464)..... | 218                     |
| 1898, June 28, ch. 517 (30 Stat. 495).....          | 133, 232                |
| (30 Stat. 505-507).....                             | 133                     |
| sec. 29 (30 Stat. 505).....                         | 232                     |
| 1898, Apr. 22 (30 Stat. 739).....                   | 387                     |
| 1898, Dec. 21, ch. 28, sec. 16 (30 Stat. 759).....  | 57                      |
| 1898, Dec. 21, ch. 29 (30 Stat. 764).....           | 150                     |
| 1899, Feb. 24, ch. 187 (30 Stat. 846, 890).....     | 253                     |
| 1899, Mar. 1, ch. 327 (30 Stat. 964).....           | 487                     |
| 1899, Mar. 3, ch. 425 (30 Stat. 1121, 1156).....    | 146, 147                |
| sec. 10 (30 Stat. 1151).....                        | 144                     |
| sec. 18 (30 Stat. 1153).....                        | 139,                    |
| 141, 142, 143, 144, 148, 149                        |                         |
| sec. 20 (30 Stat. 1154).....                        | 278                     |
| 1899, Mar. 3, ch. 427 (30 Stat. 1233).....          | 306                     |
| 1899, Mar. 3, ch. 433, sec. 2 (30 Stat. 1346).....  | 40, 41, 43              |
| 1900, Apr. 12, ch. 191 (31 Stat. 77).....           | 498, 553                |
| sec. 7 (31 Stat. 79).....                           | 469                     |
| sec. 12 (31 Stat. 80).....                          | 554                     |
| sec. 32 (31 Stat. 88).....                          | 469                     |

*Acts of Congress Cited.*

IX

|                                                         | Page.         |
|---------------------------------------------------------|---------------|
| 1900, Apr. 12, ch. 191, secs. 34, 35 (31 Stat. 84)..... | 522           |
| sec. 36 (31 Stat. 85).....                              | 554           |
| sec. 38 (31 Stat. 86).....                              | 469, 578      |
| 1900, June 2, ch. 613 (31 Stat. 257).....               | 372           |
| 1901, Feb. 2, ch. 192 (31 Stat. 748).....               | 251, 401      |
| 1901, Feb. 15, ch. 372 (31 Stat. 790).....              | 306           |
| 1901, Mar. 2, ch. 803 (31 Stat. 895, 910).....          | 383           |
| 1901, Mar. 2, ch. 810 (31 Stat. 952).....               | 244           |
| 1901, Mar. 2, ch. 812 (31 Stat. 953).....               | 554           |
| 1901, Mar. 3, ch. 864, sec. 21 (31 Stat. 1444).....     | 97            |
| 1902, Feb. 15, ch. 23 (32 Stat. 34).....                | 20            |
| 1902, Mar. 6, ch. 139, sec. 4 (32 Stat. 51).....        | 248           |
| 1902, Mar. 8, ch. 140 (32 Stat. 54).....                | 450           |
| 1902, June 17, ch. 1093 (32 Stat. 389).....             | 272           |
| 1902, July 1, ch. 1362 (32 Stat. 641).....              | 131, 133      |
| sec. 12 (32 Stat. 642).....                             | 133           |
| sec. 15 (32 Stat. 642).....                             | 133, 137      |
| sec. 16 (32 Stat. 643).....                             | 133           |
| 1902, July 1, ch. 1369 (32 Stat. 691).....              | 166, 381      |
| sec. 1 (32 Stat. 691).....                              | 384           |
| sec. 66 (32 Stat. 707).....                             | 102, 103, 106 |
| sec. 68 (32 Stat. 708).....                             | 103           |
| sec. 69 (32 Stat. 708).....                             | 103           |
| sec. 74 (32 Stat. 709).....                             | 167           |
| sec. 76 (32 Stat. 710).....                             | 385           |
| sec. 84 (32 Stat. 711).....                             | 79            |
| sec. 87 (32 Stat. 712).....                             | 384           |
| 1902, July 1, ch. 1370 (32 Stat. 712).....              | 172           |
| secs. 1-2 (32 Stat. 712).....                           | 292           |
| 1902, July 1, ch. 1378 (32 Stat. 728).....              | 340, 341      |
| 1902, July 1, ch. 1383 (32 Stat. 731).....              | 205, 206      |
| 1903, Jan. 16, ch. 192 (32 Stat. 773).....              | 272           |
| 1903, Jan. 21, ch. 196 (32 Stat. 775).....              | 302           |
| sec. 5 (32 Stat. 776).....                              | 328           |
| 1903, Feb. 14, ch. 552 (32 Stat. 825).....              | 248           |
| sec. 10 (32 Stat. 829).....                             | 151           |
| sec. 10 (32 Stat. 829).....                             | 171           |
| 1903, Mar. 2, ch. 980, sec. 2 (32 Stat. 953).....       | 385           |
| sec. 6 (32 Stat. 953).....                              | 385           |
| 1903, Mar. 3, ch. 992 (32 Stat. 969).....               | 413           |
| 1903, Mar. 3, ch. 1007 (32 Stat. 1102).....             | 117           |
| 1903, Mar. 3, ch. 1012, sec. 9 (32 Stat. 1215).....     | 367           |
| 1903, June 26 (33 Stat. 2314).....                      | 206           |
| 1904, Apr. 23, ch. 1485 (33 Stat. 268).....             | 163           |
| 1904, Apr. 28, ch. 1762 (33 Stat. 478).....             | 121           |
| 1905, Jan. 27, ch. 277, sec. 5 (33 Stat. 617).....      | 272           |
| 1905, Feb. 1, ch. 288 (33 Stat. 628).....               | 246, 304      |
| 1905, Feb. 6, ch. 453 (33 Stat. 689).....               | 102, 103      |
| 1905, Feb. 24, ch. 778 (33 Stat. 811).....              | 396           |

|                                                      | Page.                   |
|------------------------------------------------------|-------------------------|
| 1905, Mar. 3, ch. 1408 (33 Stat. 928, 973).....      | 450                     |
| 1905, Oct. 14 (34 Stat. 3183).....                   | 387                     |
| 1906, Mar. 17, ch. 955 (34 Stat. 68).....            | 20                      |
| 1906, Apr. 26, ch. 1876 (34 Stat. 137).....          | 131, 232                |
| sec. 22 (34 Stat. 145).....                          | 131, 132, 134, 138      |
| sec. 28 (34 Stat. 148).....                          | 233                     |
| 1906, May 16, ch. 2460 (34 Stat. 193).....           | 113                     |
| 1906, June 11, ch. 3071 (34 Stat. 230).....          | 21, 22                  |
| 1906, June 16, ch. 3335, sec. 8 (34 Stat. 273).....  | 451                     |
| 1906, June 21, ch. 3504 (34 Stat. 352).....          | 457                     |
| 1906, June 29, ch. 3591 (34 Stat. 584).....          | 191                     |
| (34 Stat. 585).....                                  | 589                     |
| 1906, June 29, ch. 3592 (34 Stat. 596).....          | 522                     |
| sec. 4 (34 Stat. 598).....                           | 100                     |
| sec. 15 (34 Stat. 601).....                          | 100                     |
| 1906, June 30, ch. 3913 (34 Stat. 674).....          | 227, 355, 356           |
| 1906, June 30, ch. 3915 (34 Stat. 768).....          | 355, 494                |
| sec. 3 (34 Stat. 768).....                           | 495                     |
| sec. 11 (34 Stat. 772).....                          | 495                     |
| 1906, Mar. 2 (34 Stat. 822).....                     | 232, 233                |
| 1906, June 25 (34 Stat. 835).....                    | 157                     |
| 1907, Feb. 26, ch. 1635 (34 Stat. 935, 943).....     | 211, 212                |
| 1907, Mar. 1, ch. 2285 (34 Stat. 1033).....          | 457                     |
| 1907, Mar. 4, ch. 2907 (34 Stat. 1270).....          | 246                     |
| 1907, Mar. 4, ch. 2927 (34 Stat. 1410).....          | 206                     |
| 1908, Apr. 30, ch. 153 (35 Stat. 82).....            | 457                     |
| 1908, May 20, ch. 181 (35 Stat. 169).....            | 455, 457                |
| 1908, May 23, ch. 192 (35 Stat. 260).....            | 246                     |
| 1908, May 23, ch. 193 (35 Stat. 268).....            | 246                     |
| 1908, May 27, ch. 199, sec. 9 (35 Stat. 315).....    | 131                     |
| 1908, May 27, ch. 200 (35 Stat. 381).....            | 213                     |
| 1908, May 27, ch. 204, sec. 4 (35 Stat. 400).....    | 328                     |
| 1908, May 30, ch. 228, sec. 26 (35 Stat. 543).....   | 13, 40, 41, 42          |
| 1908, May 30, ch. 236 (35 Stat. 556).....            | 415                     |
| 1908, Aug. 4 (35 Stat. 2197).....                    | 205, 206                |
| 1909, Feb. 9, ch. 100, secs. 1-2 (35 Stat. 614)..... | 108                     |
| sec. 2 (35 Stat. 614).....                           | 603, 613                |
| 1909, Mar. 2 (35 Stat. 2236).....                    | 239, 240                |
| 1909, Mar. 4, ch. 320 (35 Stat. 1075).....           | 65                      |
| 1909, Mar. 4, ch. 320, sec. 1 (35 Stat. 1075).....   | 210                     |
| sec. 8 (35 Stat. 1077).....                          | 64, 209, 210            |
| 1909, Mar. 4, ch. 321, sec. 87 (35 Stat. 1105).....  | 563                     |
| sec. 89 (35 Stat. 1105).....                         | 563                     |
| sec. 109 (35 Stat. 1107).....                        | 202, 203                |
| sec. 112 (35 Stat. 1108).....                        | 202, 203                |
| sec. 113 (35 Stat. 1109).....                        | 202, 203, 204           |
| sec. 184 (35 Stat. 1124).....                        | 418                     |
| sec. 226 (35 Stat. 1134).....                        | 200, 201, 202, 203, 204 |
| sec. 239 (35 Stat. 1136).....                        | 58, 59, 61, 62, 64      |

*Acts of Congress Cited.*

xi

|                                                    | Page.              |
|----------------------------------------------------|--------------------|
| 1909, Nov. 15 (36 Stat. 2503).....                 | 53                 |
| 1909, July 2, ch. 2 (36 Stat. 1).....              | 248                |
| sec. 7 (36 Stat. 3).....                           | 313                |
| 1909, Aug. 5, ch. 6, sec. 5 (36 Stat. 83).....     | 77                 |
| sec. 14 (36 Stat. 87).....                         | 79                 |
| sec. 28 (36 Stat. 95).....                         | 261, 262           |
| sec. 36 (36 Stat. 111).....                        | 269                |
| sec. 38 (36 Stat. 112).....                        | 164, 217, 219      |
| sec. 38 (36 Stat. 114).....                        | 217                |
| 1909, Aug. 5, ch. 7 (36 Stat. 118, 125).....       | 593, 598           |
| (36 Stat. 130).....                                | 450                |
| 1910, Apr. 21, ch. 183 (36 Stat. 326).....         | 121                |
| sec. 9 (36 Stat. 328).....                         | 122                |
| 1910, June 9, ch. 268, sec. 1 (36 Stat. 462).....  | 112, 113           |
| sec. 9 (36 Stat. 463).....                         | 113                |
| 1910, June 14, ch. 290 (36 Stat. 467).....         | 205, 206           |
| 1910, June 17, ch. 297 (36 Stat. 479).....         | 533                |
| 1910, June 24, ch. 378 (36 Stat. 628).....         | 284, 373           |
| 1910, June 25, ch. 382 (36 Stat. 635).....         | 173, 175           |
| (36 Stat. 664).....                                | 236                |
| sec. 2 (36 Stat. 668).....                         | 237                |
| 1910, June 25, ch. 384 (36 Stat. 703).....         | 120                |
| (36 Stat. 711).....                                | 51, 52             |
| 1910, June 25, ch. 385 (36 Stat. 792).....         | 344, 345           |
| 1910, June 25, ch. 386 (36 Stat. 814).....         | 266, 267, 333, 477 |
| sec. 1 (36 Stat. 814).....                         | 477                |
| sec. 3 (36 Stat. 815).....                         | 477                |
| sec. 4 (36 Stat. 815).....                         | 316                |
| sec. 8 (36 Stat. 816).....                         | 477                |
| sec. 9 (36 Stat. 816).....                         | 258,               |
| 266, 335, 368, 421, 425, 451, 513, 547             |                    |
| sec. 14 (36 Stat. 818).....                        | 316, 478           |
| sec. 17 (36 Stat. 818).....                        | 318                |
| 1910, June 25, ch. 402 (36 Stat. 831).....         | 19, 21, 22         |
| 1910, June 25, ch. 431, sec. 7 (36 Stat. 857)..... | 246                |
| 1911, Mar. 2, ch. 192 (36 Stat. 972).....          | 533                |
| 1911, Mar. 3, ch. 209 (36 Stat. 1044).....         | 253                |
| 1911, Mar. 3, ch. 226 (36 Stat. 1084).....         | 297                |
| 1911, Mar. 3, ch. 231, sec. 4 (36 Stat. 1087)..... | 595                |
| sec. 297 (36 Stat. 1168).....                      | 595                |
| 1911, Mar. 4, ch. 237 (36 Stat. 1181).....         | 533                |
| (36 Stat. 1213).....                               | 273                |
| (36 Stat. 1231).....                               | 122                |
| 1911, Mar. 4, ch. 238 (36 Stat. 1253).....         | 303                |



|                                                    | <b>Page.</b>       |
|----------------------------------------------------|--------------------|
| 1911, Mar. 4, ch. 239 (36 Stat. 1265).....         | 285, 287           |
| (36 Stat. 1267).....                               | 46                 |
| (36 Stat. 1271).....                               | 35                 |
| (36 Stat. 1279).....                               | 344, 346           |
| (36 Stat. 1287).....                               | 371                |
| (36 Stat. 1287, 1288).....                         | 279, 280           |
| (36 Stat. 1288).....                               | 35, 38             |
| (36 Stat. 1289).....                               | 14, 15, 44         |
| 1911, Mar. 4, ch. 241 (36 Stat. 1340).....         | 317, 478           |
| 1911, Mar. 4, ch. 285 (36 Stat. 1363, 1435).....   | 117                |
| (36 Stat. 1363, 1444).....                         | 211                |
| (36 Stat. 1363, 1427).....                         | 555                |
| (36 Stat. 1439).....                               | 116, 120, 121      |
| 1912, June 6, ch. 157 (37 Stat. 125).....          | 488                |
| 1912, June 19, ch. 174 (37 Stat. 137).....         | 506, 534, 583, 586 |
| sec. 1 (37 Stat. 137).....                         | 506                |
| sec. 2 (37 Stat. 138).....                         | 507                |
| 1912, June 26, ch. 182 (37 Stat. 139).....         | 533                |
| 1912, Aug. 13, ch. 287 (37 Stat. 302).....         | 579                |
| 1912, Aug. 23, ch. 350 (37 Stat. 360).....         | 532                |
| 1912, Aug. 24, ch. 355 (37 Stat. 417, 466).....    | 555                |
| 1912, Aug. 24, ch. 389, sec. 2 (37 Stat. 553)..... | 526, 550           |
| 1912, Mar. 14 (37 Stat. 630).....                  | 375, 387           |
| (37 Stat. pt. 2, p. 57).....                       | 394, 570           |

# REVISED STATUTES OF THE UNITED STATES CITED OR REFERRED TO IN THIS VOLUME.

[Where a section is referred to twice in the same opinion only the first is indicated.]

|                    | Page.                   |                      | Page.                   |
|--------------------|-------------------------|----------------------|-------------------------|
| 158 R. S. ....     | 410                     | 1622 R. S. ....      | 400                     |
| 161 R. S. ....     | 247, 249, 278           | 1624 R. S. ....      | 563, 565                |
| 169 R. S. ....     | 116, 118, 119, 123      | 1757 R. S. ....      | 598                     |
| 324 R. S. ....     | 558                     | 1765 R. S. ....      | 412                     |
| 333 R. S. ....     | 559, 561                | 1782 R. S. ....      | 397, 399, 407, 408, 409 |
| 356 R. S. ....     | 101, 227                | 1860 R. S. ....      | 300                     |
| 398 R. S. ....     | 380, 381, 382, 383      | 1891 R. S. ....      | 166                     |
| 412 R. S. ....     | 201                     | 2145 R. S. ....      | 242                     |
| 512-515 R. S. .... | 297                     | 2165 R. S. ....      | 522                     |
| 558 R. S. ....     | 595                     | 2804 R. S. ....      | 77, 78, 79, 80          |
| 561 R. S. ....     | 596                     | 2809 R. S. ....      | 364, 365, 366, 367      |
| 748 R. S. ....     | 598                     | 3074 R. S. ....      | 603                     |
| 794 R. S. ....     | 597, 598                | 3074-3080 R. S. .... | 604                     |
| 796 R. S. ....     | 597                     | 3082 R. S. ....      | 613                     |
| 828 R. S. ....     | 597                     | 3088 R. S. ....      | 364, 365, 366, 367      |
| 833 R. S. ....     | 597                     | 3229 R. S. ....      | 222, 223, 225           |
| 839 R. S. ....     | 597                     | 3402 R. S. ....      | 77, 80                  |
| 844 R. S. ....     | 597                     | 3460 R. S. ....      | 605                     |
| 1094 R. S. ....    | 251, 404, 405           | 3460 R. S. ....      | 613                     |
| 1131 R. S. ....    | 251                     | 3469 R. S. ....      | 150,                    |
| 1222 R. S. ....    | 298,                    |                      | 155, 156, 222, 223, 225 |
|                    | 299, 301, 302, 303, 406 | 3600 R. S. ....      | 28, 29, 31              |
| 1223 R. S. ....    | 300, 301, 406           | 3614 R. S. ....      | 273                     |
| 1224 R. S. ....    | 300                     | 3648 R. S. ....      | 47                      |
| 1243 R. S. ....    | 249                     | 3738 R. S. ....      | 372                     |
| 1244 R. S. ....    | 250                     | 3738 R. S. ....      | 482, 491                |
| 1254 R. S. ....    | 252, 602                | 3739 R. S. ....      | 411                     |
| 1255 R. S. ....    | 252                     | 3744 R. S. ....      | 293, 296, 437, 438      |
| 1256 R. S. ....    | 252, 401, 404           | 3744-3746 R. S. .... | 440                     |
| 1257 R. S. ....    | 252                     | 3745 R. S. ....      | 293, 294, 296, 437, 438 |
| 1259 R. S. ....    | 404                     | 3746 R. S. ....      | 295, 296                |
| 1262 R. S. ....    | 252, 402                | 3850 R. S. ....      | 200, 201                |
| 1263 R. S. ....    | 402                     | 3941-3963 R. S. .... | 392                     |
| 1274 R. S. ....    | 252                     | 3985 R. S. ....      | 419                     |
| 1275 R. S. ....    | 401, 403                | 4028 R. S. ....      | 380, 381, 382, 383      |
| 1562 R. S. ....    | 257                     | 4131 R. S. ....      | 189, 191, 574           |
| 1603 R. S. ....    | 265                     | 4132 R. S. ....      | 189                     |

|                     | Page.              |                | Page.                        |
|---------------------|--------------------|----------------|------------------------------|
| 4137 R. S.....      | 190                | 4497 R. S..... | 20                           |
| 4138 R. S.....      | 190                | 4499 R. S..... | 19, 20                       |
| 4139 R. S.....      | 190                | 4500 R. S..... | 20                           |
| 4142 R. S.....      | 191, 574           | 4580 R. S..... | 56                           |
| 4197 R. S.....      | 366, 367           | 4581 R. S..... | 56                           |
| 4200 R. S.....      | 366                | 4612 R. S..... | 584                          |
| 4202 R. S.....      | 366                | 4862 R. S..... | 172                          |
| 4206 R. S.....      | 366                | 5134 R. S..... | 92, 94                       |
| 4219 R. S.....      | 574                | 5136 R. S..... | 91                           |
| 4311 R. S.....      | 189, 574           | 5138 R. S..... | 94                           |
| 4312 R. S.....      | 189, 574           | 5141 R. S..... | 559                          |
| 4314 R. S.....      | 190                | 5142 R. S..... | 95                           |
| 4315 R. S.....      | 190                | 5143 R. S..... | 95                           |
| 4320 R. S.....      | 574                | 5151 R. S..... | 559                          |
| 4347 R. S.....      | 572, 575, 576, 577 | 5154 R. S..... | 95                           |
| 4371 R. S.....      | 572, 573, 574, 577 | 5155 R. S..... | 96                           |
| 4395 R. S.....      | 118                | 5168 R. S..... | 95, 558                      |
| 4396 R. S.....      | 118                | 5169 R. S..... | 95, 558                      |
| 4399-4500 R. S..... | 20                 | 5190 R. S..... | 81, 92, 97, 98               |
| 4400 R. S.....      | 19, 20, 22         | 5191 R. S..... | 559                          |
| 4417 R. S.....      | 20                 | 5192 R. S..... | 95                           |
| 4418 R. S.....      | 20                 | 5195 R. S..... | 95                           |
| 4421 R. S.....      | 19, 20, 21, 22     | 5201 R. S..... | 559                          |
| 4422 R. S.....      | 20                 | 5205 R. S..... | 559                          |
| 4423 R. S.....      | 20                 | 5208 R. S..... | 559                          |
| 4424 R. S.....      | 20                 | 5211 R. S..... | 558, 560, 561                |
| 4426 R. S.....      | 112, 113, 114, 115 | 5234 R. S..... | 559                          |
| 4438 R. S.....      | 149, 150, 152, 153 | 5239 R. S..... | 559                          |
| 4470 R. S.....      | 20                 | 5240 R. S..... | 558, 561                     |
| 4471 R. S.....      | 20                 | 5278 R. S..... | 523                          |
| 4472 R. S.....      | 20                 | 5290 R. S..... | 367                          |
| 4473 R. S.....      | 20                 | 5292 R. S..... | 170, 261, 263, 264           |
| 4479 R. S.....      | 20                 | 5294 R. S..... | 149,                         |
| 4482 R. S.....      | 20                 |                | 150, 151, 152, 153, 155, 171 |
| 4488 R. S.....      | 20                 | 5320 R. S..... | 367                          |
| 4489 R. S.....      | 20                 | 5488 R. S..... | 566                          |
| 4496 R. S.....      | 20                 | 5498 R. S..... | 407                          |

PROVISIONS OF THE CONSTITUTION CONSTRUED OR REFERRED TO  
IN THIS VOLUME.

|                              | Page.         |
|------------------------------|---------------|
| Art. I, sec. 8.....          | 255, 382      |
| Art. II, sec. 2.....         | 117, 256, 405 |
| Art. II, sec. 2, par. 2..... | 593           |



TREATIES AND CONVENTIONS CONSTRUED OR REFERRED TO IN  
THIS VOLUME.

---

|                                          |          |
|------------------------------------------|----------|
| Choctaw and Chickasaw Indians:           | Page.    |
| June 22, 1855 (11 Stat. 611).....        | 132      |
| Panama:                                  |          |
| Nov. 18, 1903 (33 Stat. 2234, 2235)..... | 195, 270 |
| 89760°—VOL 29—13—II                      | XVII     |



OPINIONS OF THE ATTORNEYS GENERAL CITED, QUOTED, OR  
OTHERWISE REFERRED TO IN THIS VOLUME.

|                      | Page.         |                      | Page.         |
|----------------------|---------------|----------------------|---------------|
| 3 Op. 124.....       | 257           | 18 Op. 105.....      | 47            |
| 4 Op. 219.....       | 255           | 18 Op. 161.....      | 410, 412      |
| 4 Op. 608.....       | 257           | 18 Op. 236.....      | 246           |
| 6 Op. 1.....         | 117           | 18 Op. 246, 248..... | 611           |
| 6 Op. 172.....       | 145           | 18 Op. 298.....      | 117           |
| 6 Op. 680.....       | 560           | 18 Op. 404.....      | 145           |
| 7 Op. 355, 366.....  | 12            | 18 Op. 563.....      | 245           |
| 7 Op. 594.....       | 276           | 19 Op. 56.....       | 101           |
| 9 Op. 297.....       | 255           | 19 Op. 88.....       | 501           |
| 10 Op. 144.....      | 255, 256      | 19 Op. 414.....      | 47, 492       |
| 12 Op. 229.....      | 255           | 19 Op. 513.....      | 381           |
| 12 Op. 521.....      | 598           | 19 Op. 517, 518..... | 382           |
| 13 Op. 13.....       | 257           | 19 Op. 685.....      | 492           |
| 13 Op. 44.....       | 255           | 20 Op. 70.....       | 107           |
| 13 Op. 160.....      | 101           | 20 Op. 98, 101.....  | 196           |
| 13 Op. 310.....      | 301           | 20 Op. 284.....      | 273           |
| 13 Op. 479.....      | 223           | 20 Op. 288.....      | 47, 101, 492  |
| 14 Op. 164.....      | 255           | 20 Op. 314.....      | 450           |
| 14 Op. 181.....      | 241           | 20 Op. 383.....      | 101           |
| 15 Op. 3.....        | 117, 118, 120 | 20 Op. 384.....      | 529           |
| 15 Op. 6.....        | 120, 123      | 20 Op. 420.....      | 273           |
| 15 Op. 213.....      | 51            | 20 Op. 459.....      | 372, 482, 509 |
| 15 Op. 262, 267..... | 485           | 20 Op. 462.....      | 372           |
| 15 Op. 306, 407..... | 301           | 20 Op. 536.....      | 101, 112      |
| 15 Op. 449.....      | 117           | 20 Op. 660.....      | 264           |
| 16 Op. 13.....       | 251           | 20 Op. 728.....      | 120           |
| 16 Op. 124.....      | 209           | 20 Op. 729.....      | 47, 492       |
| 16 Op. 553.....      | 245           | 20 Op. 746.....      | 47            |
| 16 Op. 615.....      | 255           | 21 Op. 65, 66.....   | 76            |
| 17 Op. 82.....       | 366           | 21 Op. 106.....      | 492           |
| 17 Op. 196.....      | 255           | 21 Op. 109.....      | 101, 112      |
| 17 Op. 258.....      | 241           | 21 Op. 124.....      | 74            |
| 17 Op. 341.....      | 492           | 21 Op. 207.....      | 286           |
| 17 Op. 388.....      | 574           | 21 Op. 338.....      | 485, 488      |
| 17 Op. 532.....      | 117           | 21 Op. 355.....      | 274, 276      |
| 18 Op. 18.....       | 257           | 21 Op. 363.....      | 123           |
| 18 Op. 98.....       | 117           | 21 Op. 364.....      | 120           |
| 18 Op. 101.....      | 286           | 21 Op. 369.....      | 227           |



|                                | Page.         |                           | Page.    |
|--------------------------------|---------------|---------------------------|----------|
| 21 Op. 394.....                | 419           | 27 Op. 493.....           | 253      |
| 21 Op. 509.....                | 101, 112, 227 | 28 Op. 66.....            | 440      |
| 21 Op. 510.....                | 492           | 28 Op. 121.....           | 286      |
| 21 Op. 537.....                | 207           | 28 Op. 129.....           | 589      |
| 21 Op. 565.....                | 207           | 28 Op. 204.....           | 320      |
| 21 Op. 568.....                | 101, 112      | 28 Op. 218, 221.....      | 157      |
| 22 Op. 13.....                 | 583           | 28 Op. 222, 226.....      | 69       |
| 22 Op. 27.....                 | 583           | 28 Op. 239.....           | 589      |
| 22 Op. 59.....                 | 410           | 28 Op. 245.....           | 473, 498 |
| 22 Op. 77.....                 | 101, 487      | 28 Op. 247.....           | 158      |
| 22 Op. 212.....                | 56            | 28 Op. 254.....           | 417      |
| 22 Op. 240.....                | 207           | 28 Op. 258.....           | 417, 436 |
| 22 Op. 245.....                | 208           | 28 Op. 262.....           | 209      |
| 22 Op. 351.....                | 73            | 28 Op. 286.....           | 568      |
| 22 Op. 477.....                | 73            | 28 Op. 358.....           | 45, 284  |
| 22 Op. 480.....                | 256, 257      | 28 Op. 369.....           | 228, 362 |
| 22 Op. 491.....                | 264           | 28 Op. 384.....           | 159      |
| 22 Op. 544.....                | 207           | 28 Op. 389.....           | 163      |
| 22 Op. 667.....                | 51            | 28 Op. 422.....           | 79       |
| 23 Op. 78, 80.....             | 75            | 28 Op. 477.....           | 238      |
| 23 Op. 92.....                 | 73            | 28 Op. 524.....           | 305      |
| 23 Op. 507.....                | 223           | 28 Op. 537.....           | 419      |
| 24 Op. 557.....                | 201           | 28 Op. 604.....           | 445, 446 |
| 24 Op. 577, 578.....           | 609           | 28 Op. 607.....           | 446      |
| 25 Op. 93.....                 | 101           | 28 Op. 608.....           | 445      |
| 25 Op. 97.....                 | 227           | 28 Op. 610.....           | 446      |
| 25 Op. 269.....                | 208           | 28 Op. 626.....           | 277      |
| 25 Op. 441.....                | 482           | 28 Op. 634.....           | 348, 349 |
| 25 Op. 517.....                | 265           | 29 Op. 64.....            | 210      |
| 25 Op. 591.....                | 257           | 29 Op. 124, 129, 130..... | 501      |
| 26 Op. 16.....                 | 265           | 29 Op. 188.....           | 582      |
| 26 Op. 30, 36.....             | 482           | 29 Op. 194.....           | 270      |
| 26 Op. 50.....                 | 230, 361      | 29 Op. 227.....           | 355      |
| 26 Op. 64, 67.....             | 374           | 29 Op. 279.....           | 371, 373 |
| 26 Op. 70.....                 | 35            | 29 Op. 279, 283.....      | 491      |
| 26 Op. 210.....                | 410           | 29 Op. 284.....           | 373, 491 |
| 26 Op. 254.....                | 485           | 29 Op. 293.....           | 440      |
| 26 Op. 605.....                | 482           | 29 Op. 335.....           | 426, 549 |
| 26 Op. 622.....                | 481, 482      | 29 Op. 368.....           | 420      |
| 26 Op. 627.....                | 117, 118      | 29 Op. 375.....           | 414, 571 |
| 26 Op. 630.....                | 119           | 29 Op. 394.....           | 571      |
| 26 Op. 631.....                | 227           | 29 Op. 397.....           | 504      |
| 27 Op. 104.....                | 473, 578      | 29 Op. 414.....           | 571      |
| 27 Op. 241.....                | 155           | 29 Op. 451.....           | 549      |
| 27 Op. 300, 305.....           | 496           | 29 Op. 468.....           | 498      |
| 27 Op. 311.....                | 145           | 29 Op. 481.....           | 509      |
| 27 Op. 346, 354.....           | 417           | 29 Op. 497.....           | 578      |
| 27 Op. 468, 471, 472, 475..... | 251           | 29 Op. 513.....           | 546      |

# INDEX TO SUBJECTS.

[See also Index-Digest, p. 615.]

## A.

|                                                                                     | Page.              |
|-------------------------------------------------------------------------------------|--------------------|
| Accountant, expert, eligibility for retirement, Inspector General's Department..... | 249                |
| Accounts, duplication of, postal-savings system.....                                | 316                |
| of deceased depositors, postal-savings system.....                                  | 477                |
| Air rifles, exportation to Mexico.....                                              | 570                |
| Alaska Fisheries, Division of, appointments in.....                                 | 116                |
| fur-seal fisheries service, appointments in.....                                    | 116                |
| salmon fisheries service, appointments in.....                                      | 116                |
| Ammunition. ( <i>See</i> Arms and munitions of war.)                                |                    |
| Animal Industry, Bureau of, meat inspection.....                                    | 355                |
| Appointments in Department of Commerce and Labor.....                               | 116                |
| Apportionment of postal-savings deposits.....                                       | 258                |
| Appropriations, construction of lock and dam at Troy, N. Y.....                     | 173                |
| construction of naval vessels, eight-hour law.....                                  | 279                |
| purchase of ammunition, eight-hour law.....                                         | 488                |
| purchase of canal and locks, Willamette Falls....                                   | 236                |
| purchase of structural material for vessels from combination.....                   | 14, 44             |
| purchase of torpedoes from combination.....                                         | 35                 |
| reissued articles of ship's equipage.....                                           | 344                |
| site for Aransas life-saving station.....                                           | 51                 |
| Aransas life-saving station, site for.....                                          | 48, 51             |
| Arid lands, reclamation of, filing copies of agreements.....                        | 437                |
| Arms and munitions of war, air rifles.....                                          | 570                |
| exportation of.....                                                                 | 375, 387, 394, 414 |
| meaning and purchase of ammunition, eight-hour law.....                             | 488                |
| paper caps for toy pistols.....                                                     | 570                |
| Army, Philippine Islands, importation of goods for.....                             | 442                |
| Army officers, acceptance of office in State National Guard.....                    | 298                |
| issuance of commission after death.....                                             | 254                |
| promotion by recess appointment.....                                                | 598                |
| relative rank.....                                                                  | 264                |
| retired, status.....                                                                | 397                |
| retirement, recess appointment.....                                                 | 598                |
| Artau, Miguel Roses, naturalization of.....                                         | 521                |
| Assignment of coal-mining leases, commodities clause.....                           | 587                |

|                                                                                | Page. |
|--------------------------------------------------------------------------------|-------|
| Assistant paymaster in Navy, embezzlement, court-martial.....                  | 563   |
| Assistant Treasurer United States, form of bond.....                           | 28    |
| Atlantic and Pacific land grant.....                                           | 124   |
| Attorney General, opinions, appeal from judgment of naturalizing<br>court..... | 99    |
| hypothetical question.....                                                     | 488   |
| Indian nonreservation schools.....                                             | 226   |
| naturalization of aliens.....                                                  | 99    |
| question involving the establishment<br>of a policy.....                       | 587   |
| question involving partial payments.....                                       | 46    |
| return of contract, confidential plans.....                                    | 293   |

**B.**

|                                                                    |     |
|--------------------------------------------------------------------|-----|
| Banks. ( <i>See</i> Postal Savings System.)                        |     |
| Belgian corporations, Philippine Islands.....                      | 435 |
| Bill of health, vessels, remission of penalty.....                 | 169 |
| Bleecker, Russell V. de W., court-martial.....                     | 563 |
| Blind, division for, Library of Congress, appointment in.....      | 532 |
| Bonds, issuance of, Cebu, P. I.....                                | 102 |
| port improvements, San Juan, P. R.....                             | 497 |
| irrigation system of Porto Rico.....                               | 577 |
| Ponce, P. R.....                                                   | 468 |
| of deputy clerks of district courts, premium on.....               | 593 |
| of Portland, Oreg., postal savings system.....                     | 335 |
| of West End and Tuscaloosa, Ala., postal savings system..          | 546 |
| of Wilson township, N. C., postal savings system.....              | 425 |
| Oklahoma building fund, postal savings system.....                 | 451 |
| ( <i>See also</i> Official bonds; Securities.)                     |     |
| Branch offices of national banks, establishment of.....            | 81  |
| Bridge of Metropolitan, etc., Ry. Co., Chicago, alteration of..... | 139 |
| Bridles, saddles, etc., exportation to Mexico.....                 | 394 |

**C.**

|                                                                             |     |
|-----------------------------------------------------------------------------|-----|
| Canal and locks, Willamette Falls, purchase of.....                         | 236 |
| Canteens, exportation to Mexico.....                                        | 394 |
| Caps for toy pistols, exportation to Mexico.....                            | 570 |
| Carbine scabbards, exportation to Mexico.....                               | 394 |
| Carey Act agreements, filing copies of.....                                 | 437 |
| Cebu, P. I., legality of bond issue.....                                    | 102 |
| Census Office, transfer of duties of disbursing clerk.....                  | 247 |
| transfer of employees.....                                                  | 313 |
| Certificate of purchase and quitclaim deed, District of Columbia.           | 1   |
| Chickasaw Indians, alienation of allotment lands.....                       | 131 |
| Choctaw Indians, alienation of allotment lands.....                         | 131 |
| Choctaw Nation, appointment of mining trustee.....                          | 231 |
| Cigars and cigarettes from Philippine Islands, internal-revenue<br>tax..... | 77  |

# Index to Subjects.

XXIII

|                                                                   | Page.  |
|-------------------------------------------------------------------|--------|
| Circulation of daily newspapers, filing statement of.....         | 526    |
| Civil service, District of Columbia.....                          | 410    |
| retired naval officer, eligibility.....                           | 503    |
| transfer of employees.....                                        | 313    |
| Coal-mining leases, assignment of, commodities clause.....        | 587    |
| Coast and Geodetic Survey, bureau of, appointments in.....        | 116    |
| Colliers, construction of, eight-hour law.....                    | 35     |
| Colon, foreign port, ocean mail service.....                      | 194    |
| Colon wharf of Panama Railroad Co., sovereignty over.....         | 269    |
| Combinations and monopolies, purchase of oil and gasoline from..  | 156    |
| structural material for                                           |        |
| vessels.....                                                      | 14, 44 |
| torpedoes.....                                                    | 35     |
| Commodities clause, assignment of coal-mining leases.....         | 587    |
| Compensation for accidents to workmen.....                        | 415    |
| Compromise of penalties, returns, corporation tax.....            | 217    |
| Comptroller of the Currency, national banks, information for Con- |        |
| gress.....                                                        | 555    |
| Confidential plans, return of contract.....                       | 293    |
| Congress, information relating to national banks.....             | 555    |
| Contracts for carrying foreign mails.....                         | 194    |
| dredging, eight-hour law.....                                     | 583    |
| Government, partial payments under.....                           | 46     |
| purchase of projectiles and smokeless powder, eight-              |        |
| hour law.....                                                     | 534    |
| purchase of supplies, eight-hour law.....                         | 505    |
| supplies, printed facing slips.....                               | 199    |
| modifications of, construction of naval vessels.....              | 285    |
| ocean mail service.....                                           | 389    |
| return of, confidential plans.....                                | 293    |
| Copyright, alien authors, proclamation of the President.....      | 64     |
| reciprocal conditions, date in proclamation.....                  | 209    |
| Corporation tax, Manila Railroad Co.....                          | 164    |
| returns, compromise of penalties.....                             | 217    |
| Corporations, foreign, Philippine Islands.....                    | 435    |
| licenses to operate radio communication.....                      | 579    |
| real estate, Philippine Islands.....                              | 435    |
| Court-martial, embezzlement, assistant paymaster in Navy.....     | 563    |
| Customs law, cigars and cigarettes from Philippine Islands.....   | 77     |
| importation of opium.....                                         | 364    |
| Customs ports, laborers, eight-hour law.....                      | 481    |

## D.

|                                                               |     |
|---------------------------------------------------------------|-----|
| Deeds. ( <i>See</i> Quit claim deeds.)                        |     |
| Department of Agriculture, findings of referee board.....     | 494 |
| Department of Commerce and Labor, appointments in.....        | 116 |
| disbursing clerk, duties of...                                | 247 |
| Department of the Interior, appointment of special disbursing |     |
| agent.....                                                    | 273 |

|                                                                    | Page. |
|--------------------------------------------------------------------|-------|
| Depositors in postal savings system, settlement of accounts.....   | 477   |
| Deposits, dividends on, postal savings system.....                 | 513   |
| Deputy Commissioner of Fisheries, appointment.....                 | 116   |
| Deputy Public Printer, status.....                                 | 210   |
| District court of Porto Rico, expenses.....                        | 553   |
| District courts, premiums on bonds of deputy clerks.....           | 593   |
| District of Columbia, certificate of purchase and quitclaim deed.. | 1     |
| civil service.....                                                 | 410   |
| correction of records, land titles.....                            | 40    |
| Dividends on deposits, postal savings system.....                  | 513   |
| Dominican Republic, exportation of arms, etc., to.....             | 387   |
| Dredging contracts, eight-hour law.....                            | 583   |
| Drugs. ( <i>See Food and drugs act.</i> )                          |       |

**E.**

|                                                                 |          |
|-----------------------------------------------------------------|----------|
| Eight-hour law, construction of colliers.....                   | 35       |
| construction of naval vessels.....                              | 279, 371 |
| dredging contracts.....                                         | 583      |
| laborers at customs ports.....                                  | 481      |
| purchase of ammunition.....                                     | 488      |
| purchase of supplies.....                                       | 505      |
| repairs to Government vessels.....                              | 395      |
| supplies, projectiles, smokeless powder.....                    | 534      |
| Emancipation proclamation, fiftieth anniversary.....            | 52       |
| Embezzlement by assistant paymaster in Navy, court-martial..... | 563      |
| Employees of Census Office, transfer.....                       | 313      |
| Employment of officers in Navy and Marine Corps.....            | 45       |
| Enrollment of vessels.....                                      | 188      |
| Erie Railroad Co., transportation of letters.....               | 418      |
| Estimates for supplies, Public Printer.....                     | 329      |
| "Europa," steamship, expired certificate of inspection.....     | 19       |
| Exportation. ( <i>See names of articles exported.</i> )         |          |

**F.**

|                                                                |     |
|----------------------------------------------------------------|-----|
| Feist Printing Co., contract for printed facing slips.....     | 199 |
| Fisheries, bureau of, appointments in.....                     | 116 |
| Deputy Commissioner of, appointment.....                       | 116 |
| Food and drugs act, rules and regulations.....                 | 494 |
| Foreign corporations, Philippine Islands.....                  | 435 |
| Foreign mails, contracts for carrying, Postmaster General..... | 194 |
| Forest reserves, rights of way for electrical purposes.....    | 303 |
| Forfeiture of imported opium.....                              | 603 |
| remission of, vessels.....                                     | 169 |

**G.**

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| Gasoline, purchase, from combination.....                                           | 156 |
| Government Printing Office, status of Deputy Public Printer and<br>chief clerk..... | 210 |
| Gun grease, exportation to Mexico.....                                              | 414 |

# Index to Subjects.

XXV

## H.

|                                                                | Page. |
|----------------------------------------------------------------|-------|
| Haines, John T., issuance of commission in name of.....        | 254   |
| Hospital charges of disabled seamen.....                       | 54    |
| Hudson River, construction of lock and dam at Troy, N. Y. .... | 173   |

## I.

|                                                                             |     |
|-----------------------------------------------------------------------------|-----|
| Importation of goods for Army, Philippine Islands.....                      | 442 |
| (See also name of article imported.)                                        |     |
| Income of corporations, returns, penalties.....                             | 217 |
| Incorporation of banks, postal savings system.....                          | 368 |
| Indemnity selections, Northern Pacific land grant.....                      | 498 |
| Indian allotment lands, alienation of.....                                  | 131 |
| nonreservation schools, Indian country.....                                 | 226 |
| Indiana, private banks, postal saving system.....                           | 420 |
| Indians, mining trustee for Choctaw Nation, appointment .....               | 231 |
| reclaimed lands, Mud Lake, Minn.....                                        | 455 |
| timber sale from reservation.....                                           | 239 |
| Inspection certificate, vessels carrying passengers without.....            | 19  |
| of lard substitute.....                                                     | 227 |
| of meat, post-mortem examination.....                                       | 355 |
| of steam motor boats.....                                                   | 112 |
| Inspector General's Department, retirement of expert accountant..           | 249 |
| Internal-revenue stamps, cigars and cigarettes from Philippine Islands..... | 77  |
| Interstate commerce, commodities clause.....                                | 587 |
| Intoxicating liquors, collection of purchase price, national banks..        | 58  |
| introduction into Indian country.....                                       | 226 |

## J.

|                                                             |     |
|-------------------------------------------------------------|-----|
| "John B. Ketcham No. 2," steamer, removal from channel..... | 276 |
|-------------------------------------------------------------|-----|

## K.

|                                                      |     |
|------------------------------------------------------|-----|
| Kent, William T., expert accountant, retirement..... | 249 |
|------------------------------------------------------|-----|

## L.

|                                                               |     |
|---------------------------------------------------------------|-----|
| Laborers at customs ports, eight-hour law.....                | 491 |
| Land grants, Atlantic and Pacific.....                        | 124 |
| Northern Pacific, indemnity selections.....                   | 498 |
| Railroad, mineral indemnity selections.....                   | 124 |
| Southern Pacific.....                                         | 124 |
| Land titles, District of Columbia, correction of records..... | 40  |
| Lands, reclamation of, Mud Lake, Minn.....                    | 455 |
| Lard substitute, meat inspection.....                         | 227 |
| Leases, assignment of, commodities clause.....                | 587 |
| Leonard, Maj. Henry, retirement.....                          | 397 |
| Library of Congress, assistant in division for the blind..... | 532 |
| transfer of disused heating plant.....                        | 524 |
| Licenses to operate radio communication.....                  | 579 |

|                                                                | Page. |
|----------------------------------------------------------------|-------|
| Life-saving medals, Borac River, P. I.....                     | 72    |
| Lighting and heating plant, Library of Congress, transfer..... | 524   |
| Liquors. ( <i>See</i> Intoxicating liquors.)                   |       |
| Lock and dam at Troy, N. Y., construction of.....              | 173   |
| Logs towed by foreign tugboat into ports of United States..... | 572   |
| Lowry National Bank, establishment of branch office.....       | 81    |
| Lysne, Iver Iverson, naturalization of.....                    | 99    |

**M.**

|                                                                           |     |
|---------------------------------------------------------------------------|-----|
| McClernand, Gen., retirement of.....                                      | 598 |
| Magazines, filing statement of ownership.....                             | 550 |
| Mails, contracts for carrying foreign.....                                | 194 |
| transportation of letters outside of.....                                 | 418 |
| Manila Railroad Co., corporation tax.....                                 | 164 |
| Manufacture of smoking opium.....                                         | 108 |
| Marine Corps officers, employment by party furnishing naval supplies..... | 45  |
| relative rank.....                                                        | 264 |
| status of retired.....                                                    | 397 |
| Mark of inspection, meat-food products.....                               | 355 |
| Market price, structural material for vessels.....                        | 14  |
| Meat inspection, lard substitute.....                                     | 227 |
| post-mortem examination.....                                              | 355 |
| Medals, life-saving, Borac River, P. I.....                               | 72  |
| Merchandise, imported, remission of seizure for undervaluation...         | 261 |
| Metropolitan, etc., Ry. Co. bridge, alteration of.....                    | 139 |
| Mexico, exportation of air rifles, etc., to.....                          | 570 |
| gun grease to.....                                                        | 414 |
| saddles, bridles, etc., to.....                                           | 394 |
| Militia, service in foreign country.....                                  | 322 |
| Mineral indemnity selections, railroad land grants.....                   | 124 |
| Mines, bureau of, transfer of heating plant to.....                       | 524 |
| Mining trustee for Choctaw Nation, appointment.....                       | 231 |
| Minnesota, reclaimed lands, Mud Lake.....                                 | 455 |
| Monopolies. ( <i>See</i> Combinations and monopolies.)                    |     |
| Motor boats, steam, inspection of.....                                    | 112 |
| Mud Lake, Minn., reclaimed lands.....                                     | 455 |
| Munitions of war. ( <i>See</i> Arms and munitions of war.)                |     |

**N.**

|                                                                  |     |
|------------------------------------------------------------------|-----|
| National banks, collecting price of intoxicating liquors.....    | 58  |
| establishment of branch offices.....                             | 81  |
| information for use of Congress.....                             | 555 |
| National Guard of State, Army officer accepting office in.....   | 298 |
| Naturalization of aliens.....                                    | 99  |
| Porto Rico.....                                                  | 521 |
| Naval officers, employment by party furnishing naval supplies... | 45  |
| relative rank.....                                               | 264 |
| retired, appointment in classified service.....                  | 503 |

# Index to Subjects.

XXVII

|                                                                                    | Page. |
|------------------------------------------------------------------------------------|-------|
| Naval supply account, articles of ship's equipage.....                             | 344   |
| Naval stations, transfer of, Porto Rico.....                                       | 205   |
| Naval vessels. ( <i>See</i> Vessels.)                                              |       |
| Navy, embezzlement by assistant paymaster, court-martial.....                      | 563   |
| Navy Department, purchase of structural material for vessels from combination..... | 44    |
| "New Island Wanderer," registry of.....                                            | 188   |
| Newspapers, filing statement of paid circulation.....                              | 526   |
| magazines, etc., statement of ownership.....                                       | 550   |
| Nomination for promotion, Army officer.....                                        | 254   |
| Northern Pacific land grant, indemnity selections.....                             | 498   |

## O.

|                                                                    |     |
|--------------------------------------------------------------------|-----|
| Ocean mail service, advertisements, contracts.....                 | 389 |
| Colon and Panama.....                                              | 194 |
| Officers of the Navy. ( <i>See</i> Naval officers.)                |     |
| Official bonds, form of, Assistant Treasurer of United States..... | 28  |
| Oil and gasoline, purchase from combination.....                   | 156 |
| Oklahoma building fund bonds, postal savings system.....           | 451 |
| Opium for smoking, manufacture and importation of.....             | 108 |
| importation of, clearance of vessels.....                          | 364 |
| importation of, forfeiture.....                                    | 603 |

## P.

|                                                                 |     |
|-----------------------------------------------------------------|-----|
| Panama, foreign port, ocean mail service.....                   | 194 |
| Republic of, sovereignty over Colon wharf.....                  | 269 |
| Panama Railroad Co., transportation, tariff rates.....          | 23  |
| Parcel-post service, Philippine Islands.....                    | 380 |
| Partial payments under Government contract.....                 | 46  |
| Penalties, compromise of, returns, corporation tax.....         | 217 |
| Penalty, remission of, after final judgment, vessels.....       | 149 |
| bill of health, vessels.....                                    | 169 |
| Periodicals, filing statement of ownership.....                 | 550 |
| Petersburg, Alaska, transfer of title to school building.....   | 272 |
| Philippine Islands, bond issue for municipality of Cebu.....    | 102 |
| entry of cigars from.....                                       | 77  |
| foreign corporations.....                                       | 435 |
| goods imported for Army.....                                    | 442 |
| Manila Railroad Co., corporation tax.....                       | 164 |
| postal service.....                                             | 380 |
| Plans, confidential, return of contract.....                    | 293 |
| Pollock, Isaac, certificate of purchase and quitclaim deed..... | 1   |
| Ponce, municipality of, Porto Rico, bond issue.....             | 468 |
| Portland, improvement bonds of, postal savings system.....      | 335 |
| Porto Rico, expenses of United States district court.....       | 553 |
| issuance of bonds for port improvements.....                    | 497 |
| legality of bond issue, Ponce.....                              | 468 |



|                                                                                 | Page.   |
|---------------------------------------------------------------------------------|---------|
| Porto Rico, legality of bond issue, irrigation system.....                      | 577     |
| naturalization of aliens.....                                                   | 521     |
| transfer of naval stations.....                                                 | 205     |
| Portia, foreign vessels transporting passengers.....                            | 318     |
| Colon and Panama, ocean mail service.....                                       | 194     |
| Postal savings system, apportionment of deposits.....                           | 258     |
| bonds of West End and Tuscaloosa, Ala... ..                                     | 546     |
| bonds of Wilson Township, N. C.....                                             | 425     |
| dividends on deposits.....                                                      | 513     |
| duplication of accounts.....                                                    | 316     |
| improvement bonds of Portland.....                                              | 335     |
| Indiana private banks, corporate attributes.....                                | 420     |
| Oklahoma building-fund bonds.....                                               | 451     |
| organization of banks.....                                                      | 368     |
| ownership of securities.....                                                    | 266     |
| pledge of loaned securities.....                                                | 333     |
| settlement of accounts.....                                                     | 477     |
| Postal service, execution of contract by employee of.....                       | 199     |
| Philippine Islands.....                                                         | 380     |
| transportation of letters outside the mails.....                                | 418     |
| Postmaster General, contracts for carrying foreign mails.....                   | 194     |
| contracts for ocean-mail service.....                                           | 389     |
| execution of contract for supplies.....                                         | 199     |
| parcel-post service with Philippine Islands..                                   | 380     |
| regulations dispensing with administration<br>proceedings.....                  | 477     |
| Poundstone, Commander Homer C., appointment to civil office..                   | 503     |
| President, authority to send militia into foreign country.....                  | 322     |
| copyright reciprocal conditions, Proclamation.....                              | 64, 209 |
| national banks, information for Congress.....                                   | 555     |
| power to issue general proclamation.....                                        | 52      |
| selection of Surgeon General.....                                               | 287     |
| Printed facing slips, execution of contract for.....                            | 199     |
| Proclamation of President, copyright reciprocal conditions.....                 | 64, 209 |
| Projectiles, purchase of, eight-hour law.....                                   | 534     |
| Promotion, nomination of Army officer for.....                                  | 254     |
| Proposals and estimates, supplies, Public Printer.....                          | 329     |
| Public Health and Marine-Hospital Service, selection of Surgeon<br>General..... | 287     |
| Public lands, indemnity selections, mineral lands.....                          | 498     |
| Public Printer, acceptance of estimates for supplies.....                       | 329     |
| Purchase of land for Aransas life-saving station.....                           | 48, 51  |
| of structural material for vessels from combination . . . .                     | 14, 44  |

**Q.**

|                                                                    |   |
|--------------------------------------------------------------------|---|
| Quitclaim deed of lots, District of Columbia, to Isaac Polock..... | 1 |
|--------------------------------------------------------------------|---|

# *Index to Subjects.*

XXIX

## **R.**

|                                                                                                          | <b>Page.</b> |
|----------------------------------------------------------------------------------------------------------|--------------|
| Radio communication, issuance of licenses.....                                                           | 579          |
| Railroad land grants, mineral indemnity selections.....                                                  | 124          |
| Real estate corporations, Philippine Islands.....                                                        | 435          |
| Reasonable price, structural material for vessels.....                                                   | 14           |
| Recess appointment, Army officers promoted by.....                                                       | 598          |
| Reclamation of arid lands, filing copies of agreements.....                                              | 437          |
| lands, Mud Lake, Minn.....                                                                               | 455          |
| Records of War Department, correction of, land titles, District of Columbia.....                         | 40           |
| Referee board of Department of Agriculture, findings.....                                                | 494          |
| Registry and enrollment of vessels.....                                                                  | 188          |
| Reid Wrecking Co., removal of vessel from channel.....                                                   | 276          |
| Retirement, expert accountant, Inspector General's Department. of Army officers, recess appointment..... | 249          |
|                                                                                                          | 598          |
| Returns of corporations, income tax, penalties.....                                                      | 217          |

## **S.**

|                                                                                  |     |
|----------------------------------------------------------------------------------|-----|
| Saddles, bridles, etc., exportation to Mexico.....                               | 394 |
| St. Joseph County Savings Bank, Ind., postal savings depositary.....             | 513 |
| San Juan, P. R., bond issue for port improvements.....                           | 497 |
| School building, Petersburg, Alaska, transfer of title.....                      | 272 |
| Seamen, disabled, transportation expenses, etc.....                              | 54  |
| dredging contracts, eight-hour law.....                                          | 583 |
| remission of penalty after final judgment.....                                   | 149 |
| Secretary of Agriculture, authority to grant rights of way, forest reserves..... | 303 |
| findings of referee board.....                                                   | 494 |
| Food and drugs act, rules and regulations.....                                   | 494 |
| Secretary of Commerce and Labor, appointments by.....                            | 116 |
| assignment of coal-mining leases.....                                            | 587 |
| Food and drugs act, rules and regulations.....                                   | 494 |
| licenses to operate radio communication.....                                     | 579 |
| remission of penalty, vessels...                                                 | 169 |
| remission of penalty after final judgment.....                                   | 149 |
| Secretary of the Interior, forest reserves, rights of way.....                   | 303 |
| Indian allotment lands.....                                                      | 131 |
| return of contract.....                                                          | 293 |
| timber sale from Indian reservation....                                          | 239 |
| Secretary of the Navy, articles of ship's equipage.....                          | 344 |
| authority to send naval officer abroad in promotion of commerce.....             | 45  |
| modification of contracts, naval vessels....                                     | 285 |

|                                                                           | Page.  |
|---------------------------------------------------------------------------|--------|
| Secretary of the Navy, Navy and Marine Corps officers, relative rank..... | 264    |
| partial payments under contracts.....                                     | 46     |
| purchase of structural material for vessels from combination.....         | 14     |
| purchase of torpedoes from combination...                                 | 35     |
| transfer of naval stations.....                                           | 205    |
| return of contract.....                                                   | 293    |
| Secretary of the Treasury, authority to remit or mitigate a seizure.      | 261    |
| Food and drugs act, rules and regulations.....                            | 494    |
| life-saving medals.....                                                   | 72     |
| site for Aransas life-saving station.....                                 | 48, 51 |
| Secretary of War, alteration of Metropolitan, etc., Ry. Co. bridge.       | 139    |
| correction of records, land titles, D. C.....                             | 40     |
| Securities for postal savings funds, loaned to bank.....                  | 333    |
| ownership of.....                                                         | 266    |
| Seizures, authority of Secretary of Treasury to remit or mitigate..       | 261    |
| remission of, undervaluation of imported merchandise..                    | 261    |
| Serums, viruses, etc., importation and sale of.....                       | 340    |
| Simpson, H. G., compensation for accident.....                            | 415    |
| Sitgreaves National Forest, timber sale from Indian lands.....            | 239    |
| Smokeless powder, purchase of, eight-hour law.....                        | 534    |
| Southern Pacific land grant.....                                          | 124    |
| Sovereignty over the Colon Wharf.....                                     | 269    |
| Stamp tax, Philippine Islands, importation.....                           | 442    |
| Standard Oil Co. of Indiana, purchase of oil, etc., from.....             | 156    |
| Standards, Bureau of, appointments in.....                                | 116    |
| Steam motor boats, inspection of.....                                     | 112    |
| Steamer "John B. Ketcham No. 2," removal from channel.....                | 276    |
| Steamship "Europa," expired certificate of inspection.....                | 19     |
| Supplies, contracts for purchase of, eight-hour law.....                  | 505    |
| meaning of, eight-hour law.....                                           | 534    |
| Public Printer's acceptance of estimates for.....                         | 329    |
| Surgeon General, Public Health and Marine-Hospital Service....            | 287    |

## T.

|                                                            |     |
|------------------------------------------------------------|-----|
| Tariff rates, Panama Railroad Co.....                      | 23  |
| vessels loading at Colon Wharf.....                        | 269 |
| Taxation, Philippine Islands, goods imported for Army..... | 442 |
| Timber sales, Indian reservation.....                      | 239 |
| Torpedoes, purchase of, from combination.....              | 35  |
| Transfer of employees, Census Office.....                  | 313 |
| Transportation expenses of disabled seamen.....            | 54  |
| of coal, common carriers.....                              | 587 |
| of letters outside the mails.....                          | 418 |
| of passengers, foreign vessels.....                        | 318 |
| Troy, N. Y., construction of lock and dam.....             | 173 |

# Index to Subjects.

XXXI

|                                                                 | Page. |
|-----------------------------------------------------------------|-------|
| Trusts. ( <i>See</i> Combinations and monopolies.)              |       |
| Tugboat, foreign, towing logs into ports of United States.....  | 572   |
| Tuscaloosa, Ala., improvement bonds, postal savings system..... | 546   |

## U.

Unlawful trusts. (*See* Combinations and monopolies.)

## V.

|                                                            |          |
|------------------------------------------------------------|----------|
| Van Schaick, Capt. Louis J., life-saving medal.....        | 72       |
| Vessels, carrying mails, foreign ports.....                | 194      |
| carrying passengers without certificate of inspection..... | 19       |
| clearance of, importation of opium.....                    | 364      |
| construction of, eight-hour law.....                       | 279, 371 |
| construction of, modification of contracts.....            | 285      |
| construction of, partial payments on.....                  | 46       |
| dredging contracts, eight-hour law.....                    | 583      |
| equipment of, appropriation.....                           | 344      |
| foreign, transportation of passengers.....                 | 318      |
| foreign tugboat towing logs into United States.....        | 572      |
| loading at Colon Wharf, tariff.....                        | 269      |
| medicinal expenses, etc., disabled seamen.....             | 54       |
| registry and enrollment of.....                            | 188      |
| remission of penalty, bill of health.....                  | 169      |
| purchase of structural material for, from combination....  | 14       |
| remission of penalty after final judgment.....             | 149      |
| repairs to, eight-hour law.....                            | 395      |
| Viruses, serums, etc., importation and sale of.....        | 340      |

## W.

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| War Department, correction of records of, land titles, District of<br>Columbia..... | 40  |
| transfer of naval stations to.....                                                  | 205 |
| West End, Ala., improvement bonds, postal-savings system.....                       | 546 |
| White Mountain Apache Indian Reservation, sale of timber.....                       | 239 |
| Willamette Falls, purchase of canal and locks.....                                  | 236 |
| Wilson Township, N. C., bonds of, postal-savings system.....                        | 425 |
| Wolff, Elias A., naturalization of.....                                             | 521 |
| Workmen, compensation for accidents to.....                                         | 415 |



OPINIONS  
OF  
HON. GEORGE W. WICKERSHAM, OF  
NEW YORK.

APPOINTED MARCH 5, 1909.

---

DISTRICT OF COLUMBIA—VALIDITY OF CERTIFICATE OF  
PURCHASE AND QUITCLAIM DEED—ISAAC POLOCK.

A certificate of purchase of certain lots in the city of Washington, which was executed July 22, 1797, by the commissioners in favor of Isaac Pollock but was not recorded until May 30, 1804, did not vest the legal title in the purchaser for the reason that the law then in force required it to be recorded within six months from the date thereof in order to have legal effect.

While the certificate in question did not convey the legal estate, yet it passed an equitable interest in the land, and, being equivalent to a contract of sale by the commissioners, the execution of a quitclaim deed to the claimants by the Chief Engineer of the Army is not prohibited by the act of May 30, 1908 (35 Stat. 544), but such deed executed by him will be valid.

DEPARTMENT OF JUSTICE,  
*March 8, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of December 19, 1910, and, as I understand, the facts upon which you request my opinion are as follows:

On the 22d day of July, 1797, Gustavus Scott and Alex. White, commissioners appointed under the act of Congress entitled "An act for the establishing the temporary and permanent seat of government of the United States," executed in favor of Isaac Pollock a certificate of purchase in the following language:

"TERRITORY OF COLUMBIA:

"This is to certify that on the twenty-fourth day of December, in the year one thousand seven hundred and

86270°—VOL 29—11—1

ninety-three, Robert Morris and James Greenleaf purchased of the Commissioners appointed in virtue of the act of Congress of the United States entitled "An Act for the establishing the temporary and permanent seat of the government of the United States," lots numbered six, nine and ten, in square numbered seventy-four in the City of Washington for a valuable consideration, subject to the terms and conditions concerning the manner of buildings and improvements declared by the President of the United States, and the said lots having since been transferred to Isaac Pollock and the principal and interest of the purchase money for said lots being paid and satisfied to the Commissioners aforesaid, it is therefore considered that the said Isaac Pollock, his heirs and assigns be and they are hereby entitled to the same lots in fee simple agreeably to the acts of Assembly of the State of Maryland in such cases made and provided.

"Witness our hands this Twenty-second day of July, in the year One Thousand, Seven Hundred and Ninety-seven.

"(Signed) GUSTAVUS SCOTT.

"ALEX. WHITE."

This certificate was not recorded in the book kept by the clerk to the commissioners for that purpose until May 30, 1804, the notation for record being in the following language:

"At the request of Isaac Pollock, the following certificate was recorded the thirtieth day of May, A. D., One thousand Eight hundred and Four."

Frederick L. Vogt and Mrs. Rosina Kaiser, as trustees under the will of their deceased father, John H. Vogt, have a complete chain of title to a certain portion of lot numbered 10, mentioned in the foregoing certificate; and they insist that by virtue of the various instruments which constitute their chain of title, they have acquired a perfect title to the part of said lot which is described therein; but, if there be any doubt with reference to the validity of their title thereto, inasmuch as a certificate was properly issued to their remote vendors, which shows that the purchase price was entirely paid, and as they are therefore justly

entitled to a perfect title to said premises, they request that the Chief Engineer of the Army execute to them a quitclaim deed for their portion of said lot; and

The questions you desire answered are:

1. Whether or not, in view of the fact that the certificate above set forth was not recorded until seven years after its issuance, the parties to whom it was issued acquired a good and perfect title to the premises; and

2. If their title is for that reason defective, whether the Chief Engineer of the Army has authority to execute a quitclaim deed therefor, and thus render it perfect.

A proper consideration of the first question will require a review of the legislation under which the District of Columbia was established and which formed a basis of the titles to lands situated therein.

By the act of Congress of July 16, 1790 (1 Stat. 130), establishing the temporary and permanent seat of government of the United States, provision was made for the appointment of three commissioners by the President, who were given power to purchase or accept such quantity of land on the eastern side of the Potomac River for the location of a federal city as the President might deem proper, and these commissioners were required to provide suitable buildings for the accommodation of Congress. The commissioners having been appointed, in March, 1791, they made an agreement with certain proprietors of lands, and, feeling that it would be necessary for the successful administration of their offices to secure specific legislation from the State of Maryland ratifying the agreement with the proprietors and giving them powers of municipal control and certain powers to enforce the terms of said agreement, and presenting a method by which the division and sale of the lands obtained by them could be made, they addressed a memorial to the Maryland legislature; and on December 19 of that year the legislature of Maryland passed an act which was the basis of the operations incident to the foundation of the federal city.

This statute included some of the provisions pertinent to the present consideration; and it should be considered



in the light of the Maryland law in effect at the time of its enactment, which law can be best understood by a review of the legislation of that State relating to land titles.

As was said by Mr. Justice Hagner in his opinion in the case of *United States v. M. F. Morris et al.* (23 W. L. R. 749), the proprietary of Maryland was vested—

“with powers and prerogatives which fell little short of those of royalty itself.”

In the language of the charter, his powers were such—  
“as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used or enjoyed, or of right could, or ought to have, hold, use or enjoy.”

Section 7 of the Charter of Maryland grants to Cecilius Calvert, Baron of Baltimore, and his heirs—

“free, full and absolute power \* \* \* to ordain, make, and enact laws of what kind soever, according to their sound discretions, whether relating to the public state of the said province, or the private utility of individuals.”

Section 18 of the charter nullified the statute *Quia Emplores*, or any other “thing, cause, or matter” which would in any wise interfere with the free disposition of the soil of Maryland by the proprietary, his heirs and assigns, leaving such disposition entirely within the discretion of Lord Baltimore and his successors.

Under the sweeping terms of this charter there is no doubt of the power of the proprietary to affix such conditions to the transfer of real estate as he might deem desirable in his discretion, the only restriction being that the laws made should be “consonant to reason and be not repugnant or contrary (but so far as conveniently may be) agreeable to the laws, statutes, customs, and rights of this our Kingdom of England.”

As a consequence of the conditions of the new country, the difficulties of accurate surveys, and the disposition to seize upon wild lands, it became necessary in the latter part of the seventeenth century for the proprietary to promulgate various laws for the ascertainment of bounds and the quieting of titles; and with a view of preventing further confusion an act was passed June 6, 1674 (Kilty's Land-

holder's Assistant, Appendix, p. xxxvi), stating in its preamble the following purpose:

"For the better establishing of a way and method of conveying of manors, lands, tenements and hereditaments, within this province, for the future; and for the avoiding of all abuses and deceit, in encumbering estates by mortgages, and otherwise, by the owners of lands and hereditaments to the prejudice of purchasers for valuable considerations, and such as lend their monies upon real securities."

This act provided that no—

"manors, lordships, lands, tenements or hereditaments whatsoever \* \* \* shall pass, alter or change from one to another \* \* \* except the deed or deeds \* \* \* be made by writing indented and sealed; and that the same be acknowledged in the provincial court of this province, or before two of the privy council of this province, or in the court of the same county, or before two of the justices of the peace of the same county where the same manors, lordships, lands, tenements and hereditaments do lie; *and be enrolled* \* \* \* in the provincial court of this province, or in the county court where the land doth lie: the same enrollment to be made within twelve months, next after the date of the said writings indented."

This law was confirmed by the laws of 1676, chapter 2, and by the act passed June 3, 1715 (1715, Kilty's Laws of Maryland, chap. 47, sec. 5), this law was referred to as—

"a very good law \* \* \* that no manors, lordships, lands, tenements and hereditaments whatsoever within this province, should alter, pass or change from one to another \* \* \* except the same were acknowledged and enrolled as in the said law is directed."

The law of 1715 enacted that whatsoever deeds had been enrolled should be taken and adjudged to be effectual in law, but that if any deed or reconveyance was not enrolled according to law "nothing has passed by said deed or deeds, conveyance or conveyances, not enrolled as aforesaid." Two other similar laws were recited in the

act of 1715, and in connection with each of these laws it was specifically enacted that if deeds were sealed and delivered, but not enrolled according to the intent of the law, nothing passed by such deed or deeds. Section 8 of said act provided—

“for the better ascertaining and way and method for conveying of manors, lands, tenements and hereditaments for the future, and for the avoiding abuses and deceits by mortgages”—

by enacting that—

“no manors, lands, tenements or hereditaments whatsoever, within this province, shall pass, alter or change, from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made, by reason of any bargain and sale only, except the deed of conveyance by which the same shall be intended to pass, alter or change the same, be made by writing indented and sealed, and the same to be acknowledged in the provincial court, or before one justice thereof, or in the county court, or before two justices of the same, where such manors, lands, tenements or hereditaments do lie, *and enrolled within six months after the date of such writing indented as aforesaid.*”

In an act passed December 6, 1766, being chapter 14, laws of 1765 (Kilty's Laws of Maryland), reference is made to chapter 17, acts of 1715, heretofore quoted, in the preamble, reciting that the said act—

“extends to and regards only such conveyances as operate by way of bargain and sale; and the good ends and purposes of the said act are now in great measure eluded by the frequent use of conveyances by feoffment, lease and release, confirmation, release, limitation and declaration of uses, and other modes of conveying”—

and further reciting that—

“a general registry of all deeds and conveyances of land, would very much tend to the security of creditors and purchasers, the preservation of titles, and thereby to the advancement of the value of real estates, and particularly

to prevent abuses and deceits by mortgages, and the purchase of pretended titles."

And under this preamble it was enacted:

"That after the first day of May next, no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged in the provincial court, or before one of the justices thereof, in the county court or before two justices of the same county where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, *and be also enrolled* in the records of the same county, or the provincial court, as the case may be, within six months after the date of such deed or conveyance."

By chapter 10 of the acts of November, 1779, the six months referred to were declared to be calendar months.

In chapter 72, section 11, of the acts of 1785, the act which extended and defined the powers of the court of chancery of Maryland, it was enacted that, in case any deed

"hath been or shall hereafter be executed, to the validity of which recording is necessary by law, and such deed hath not been, or shall not be, recorded agreeably to law \* \* \* that the chancellor shall have full power and authority \* \* \* to order and decree that such deed shall be recorded."

However, there was other language in the section which protected purchasers without notice and creditors from the effect of such decrees of enrollment.

With the law relating to the registration of land titles in this condition, the act of December 19, 1791 (Kilty's Laws of Maryland, 1791, chap. 45), was passed in response to the memorial of the commissioners of the city of Washington, and the following provisions relative to the recording of deeds were contained therein:

By section 7 the commissioners were authorized to appoint a clerk for recording deeds to lands within the territory ceded by Maryland to the United States. This clerk was required to

“provide a proper book for the purpose, and therein record, in a strong legible hand, all deeds, duly acknowledged, of lands in the said territory, delivered to him to be recorded, and in the same book make due entries of all divisions and allotments of lands and lots made by the commissioners in pursuance of this act, and certificates granted by them of sales, and the purchase money having been paid.”

The section further provided for the preservation of the records and the tenure and fees of the clerk.

Section 8 provided:

“That acknowledgments of deeds made before a person in the manner and certified as the laws of this State direct, or made before, and certified by, either of the commissioners, shall be effectual; and that no deed hereafter to be made of or for lands within that part of the said territory, which lies within this State, *shall operate as a legal conveyance*, nor shall any lease for more than seven years be effectual, unless the deed shall have been acknowledged as aforesaid, *and delivered to the said clerk to be recorded* within six calendar months from the date thereof.”

On December 23, 1792 (Kilty's Laws, 1792, chap. 59), another act was passed by the legislature of Maryland, which reads as follows:

“Whereas doubts have arisen upon the act to which this is a supplement, whether it be essential to the validity of deeds *and other conveyances of lands* in that part of the territory of Columbia which lies within this State, that the same be recorded in the manner prescribed by the laws of this State before the passage of the said act; to remove which doubts

“*Be it enacted by the General Assembly of Maryland, That all deeds and other conveyances of lands* lying within the said territory, *and recorded agreeably to the directions and provisions of the said act* by the clerk appointed in the manner therein provided for the recording of deeds within said territory, shall be as good, valid and sufficient, in law, for the purposes of passing the estates therein mentioned, and for all other purposes, as if the same were also recorded in the manner prescribed by the laws of this State, before

the passage of the said act for the recording of deeds and other conveyances of land within this State."

On December 28, 1793 (Kilty's Laws, November, 1793, chap. 58), another act supplemental to the act of December 17, 1791, was passed, section 1 of which reads as follows:

"That the certificates granted, or which may be granted, by the said Commissioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase money, and interest, if any shall have arisen thereon, *and recorded agreeably to the directions of the act concerning the territory of Columbia and city of Washington*, shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance."

The acts of the Maryland legislature above cited constituted the law of the District of Columbia as to the recording of deeds until May 31, 1832, when an act was passed by Congress (4 Stat. 520) providing for the form of executing deeds for lands lying in the District of Columbia when the owners of such lands were residents elsewhere. Section 1 of this act prescribed the method of acknowledgment and certification of such deeds, and provided that if a deed after having been executed, acknowledged, and certified as required by law—

"shall be recorded amongst the land records of the county of Washington \* \* \* within six calendar months from the day of its date \* \* \* such deed shall be good and effectual for the purpose or purposes therein mentioned."

This act recognized and followed the requirement of the Maryland law that a deed must be recorded within six months after the day of its date in order to have legal effect; but by the act of April 20, 1838 (5 Stat. 226), the law was changed so that instruments of conveyance, except deeds of trust and mortgages, delivered to the clerk to be recorded within six months were to take effect and be valid as to all persons from the time the deed was acknowledged, but deeds of trust and mortgages and all other conveyances not delivered for record within six months after

being sealed and delivered were to take effect as to creditors and subsequent purchasers for value without notice only from the time when they were delivered to the clerk to be recorded.

By the act of March 3, 1863 (12 Stat. 807), any question as to the sufficiency of the commissioner's certificates in the matter of acknowledgment was quieted by the following provision:

"That no deed or conveyance heretofore made, in pursuance of law, of squares or lots of public land in the city of Washington, by the Commissioner of Public Buildings, or any other authorized officer, shall be deemed invalid in law, for the want of an acknowledgment by said Commissioner or other authorized officer before such judicial officers as deeds of real property made between individuals are required by law to be acknowledged."

The certificate of purchase issued by the commissioners to Isaac Pollock does not purport on its face to convey the legal title. It recites the purchase, the payment of the purchase price, and that Pollock, his heirs and assigns were entitled to the lots in fee simple, but it contains no clause vesting such title in said Pollock. Therefore, if the legal title was ever vested in the purchaser, it was by virtue of the act of December 28, 1793, which provided that certificates in which were acknowledged the full payment of the purchase money and interest, and which were "recorded agreeably to the directions of the act concerning the territory of Columbia and city of Washington"—

"shall be sufficient to vest the *legal estate* in the purchasers, their heirs and assigns, according to the import of such certificate, without any deed or formal conveyance."

Therefore, if this certificate was not recorded as required by the act mentioned, it did not pass the legal estate.

Before the passage of this act of December 28, 1793, these certificates were not deeds of conveyances, and the only law with reference to their registration was that provision in section 7 of the act of December 19, 1791, which required them to be *entered* in the book kept by

the clerk, with the amount of money paid and the division and allotments of land; in which book was also to be *recorded* all deeds of conveyance. It is doubtful whether it was here meant that the entire certificate should be entered, or only a memorandum mentioning the lots, to whom sold, and the amount paid. But by said act of 1793 these certificates became, for all purposes, equivalent to deeds purporting to convey fee-simple titles; and hence it is reasonable to suppose that it was intended by the legislature that the same law should apply to the recording of these certificates as then governed the recording of deeds conveying such titles; and when it was required by said act that in order to pass the legal title the certificate should be *recorded* agreeably to the act concerning the territory of Columbia, I think reference was had to the provision of that act relating to the recording of deeds and not to the entering of the certificates. This view is strengthened by the fact that it was clearly indicated by the act of December 23, 1792, that the requirements with reference to recording instruments applied not only to deeds, but also to all "other conveyances of lands."

By section 8 of the act of 1791, it was expressly provided that no deed for lands lying within the territory to which the act was applicable should operate *as a legal conveyance* unless it should be delivered to the clerk to be recorded within six calendar months from the date thereof; and it was to this provision, I think, that reference was made in the said act of 1793 in speaking of the recording of certificates.

It is insisted that the clause in section 5 of the act of 1791, to wit:

"And all the lots and parcels which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchase"—

made certificates valid, regardless of whether they were ever entered or recorded; but I do not think that this general clause has any relation to the question of registration; and, furthermore, this certificate here in question did not,



by its terms and conditions, purport to vest in the purchasers a title in fee.

In view of the positive and unambiguous requirements of the laws of Maryland relating to the recording of titles when these several acts were passed by the legislature of that State, and the manifest purpose of the legislature that when these certificates were given the effect of deeds they should be subject to the same laws with reference to recording, I am strongly inclined to the opinion that, inasmuch as this certificate was not recorded until seven years after its issuance, it did not pass to Pollock the legal title to lot 10. At any rate, it must be considered as a question of such doubt as to constitute a serious cloud upon the title thereto of the present claimants.

The second question is whether or not the Chief Engineer of the Army has the power to execute a quitclaim deed in order to perfect the claimants' title.

On August 1, 1855, Attorney-General Cushing transmitted an opinion (7 Op. 355, 366) to the Secretary of the Interior, in which he reviewed very fully and carefully the various statutes relating to the transfer of lands in the District acquired by the United States from the original proprietors thereof; and he thus stated the final conclusion reached by him:

"Nevertheless, it seems to me, after careful analysis and consideration of all the elements of the question, that the Board of Commissioners, by force of the act of Congress of 1790, and the two acts of the State of Maryland, as construed by the acts of Congress of 1796 and 1798, the superintendent, under that of 1802, and the commissioner, under that of 1816, have had lawful authority to sell and convey the unreserved and legally saleable lots of the Government in the city of Washington, subject, however, in all things affecting the same, to the direction of the President of the United States."

From a careful consideration of this opinion, I see no reasonable grounds for doubting the correctness of the conclusion reached therein, and therefore assume that, under the act of April 20, 1816, which abolished the office of superintendent and substituted that of the commissioner

of public buildings, such commissioner did, from and after that date, have the power to execute deeds for lands belonging to the United States within said territory.

By section 2 of the act of March 2, 1867 (ch. 167, 14 Stat. 466), it was provided:

"That the office of commissioner of public buildings is hereby abolished; and the chief engineer of the army shall perform all the duties now required by law of said commissioner; and shall also have the superintendence of the Washington Aqueduct and all the public works and improvements of the government of the United States in the District of Columbia, unless otherwise provided by law."

By virtue of this act all authority previously exercised by the commissioner of public buildings was vested in the Chief Engineer of the Army, and he was necessarily authorized thereby to execute conveyances of lands within the District of Columbia belonging to the United States. This was so held by Attorney-General Garland, in an opinion which appears in volume 2, page 339, manuscript copies of title opinions, in the office of the attorney in charge of titles, Department of Justice.

The fact that the defect in the title here under consideration occurred while the original commissioners were vested with the authority to convey titles to these lands, and not since the power to convey was vested in the Chief Engineer of the Army, can not alter the principle, as the rights of the parties are the same in each instance.

In section 26 of the act of May 30, 1908 (ch. 228, 35 Stat. 543), after providing for the appointment of a commission to investigate and report on transfers by the United States of all titles to lands lying in the District of Columbia, it was provided:

"Pending the report of said commission, unless otherwise directed by Congress, all authorizations heretofore made for the sale of government land in the District of Columbia, in which conveyances have not been made, or contracts entered into, shall be held in abeyance."

Is the power of the Chief Engineer of the Army to execute a quitclaim deed to the claimants of lot 10 in con-

firmation of the purchase evidenced by the certificate to Pollock suspended by this provision?

While the certificate in question did not convey the legal estate, yet it passed an equitable interest in the land, and was equivalent to a contract of sale.

The act of 1793 provided that if the certificate should be recorded as required by the previous act relating to titles in the District of Columbia, it should pass *the legal title*, but it did not imply that in the absence of its being recorded it should become a nullity, and that the equitable title evidenced by the certificate should thereby be lost.

The purpose of the act was to enable the certificate to perform the function of a deed, and was not to destroy any virtue that previously existed in the certificate. Hence, it remains as a written evidence of a contract of sale made by the original commissioners; and, therefore, I am of the opinion that the execution of a quitclaim deed by the Chief Engineer of the Army, as requested by the claimants of a part of lot 10, is not prohibited by the provision above quoted of the act of 1908, and that such deed executed by him will be valid.

Respectfully,

J. A. FOWLER,  
*Acting Attorney-General.*

The SECRETARY OF WAR.

---

PURCHASE OF STRUCTURAL MATERIAL FOR VESSELS FROM  
COMBINATION OR MONOPOLY—REASONABLE PRICE.

The provision of the naval appropriation act of March 4, 1911 (36 Stat. 1289), that no part of the money therein appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament or machinery" from any combination or monopoly, imposes upon the Secretary of the Navy the duty of determining the fact of monopoly or conspiracy and, in ascertaining this fact, he is free to resort to all sources of information at his command.

The presumption in the absence of any evidence to the contrary is here, as in all other cases, that the parties are innocent rather than guilty. The act does not, however, contemplate a previous judicial determination of combination or conspiracy before the prohibition of purchase applies.

The Secretary may require, as a condition of receiving any bid, an affidavit from the person, or a responsible representative of the firm or corporation proposing to deal with the Government, to the effect that such person, firm, or company was not engaged in such a combination, and might also, by appropriate stipulations in the contract, provide for its annulment if it were ascertained that it had been obtained by false representations in that respect.

By the provision of the act of March 4, 1911 (36 Stat. 1289), that "no purchase of structural steel, ship plates or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture" Congress committed the determination of what are reasonable prices to the sound discretion and best judgment of the Secretary of the Navy, subject to the obligation to keep the cost of construction as much as possible within the bounds of the maximum prescribed.

The market price of any commodity under normal conditions is taken to be its reasonable value; and so in any case where purchase can be made in an open market under conditions of free competition it may be assumed that the prevailing price will not be "in excess of a reasonable profit above the actual cost of manufacture."

DEPARTMENT OF JUSTICE,

*March 14, 1911.*

SIR: Yours of the 7th instant, addressed to the Attorney-General, has been referred to me for answer. I have given careful consideration to the matters involved, and in reply to your inquiries beg to say:

The first condition imposed by the provision of the act quoted by you (naval appropriation act of March 4, 1911, 36 Stat. 1289) is that no part of the money appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament or machinery from any persons, firms or corporations who have combined or conspired to monopolize the interstate or foreign commerce or trade of the United States, or the commerce or trade between the States and any Territory or the District of Columbia, in any of the articles aforesaid."

The combination or conspiracy defined has reference only to the monopolizing of trade in the articles specified.

There is no particular form of inquiry suggested and no mode prescribed for ascertaining the fact which imposes a prohibition upon the purchase. The Secretary of the Navy is free, therefore, to inform himself from any and all sources and by any and all means at his command, in such way as seems to him most apt, for the purpose of ascertaining the essential fact, and, having exercised his dis-

cretion in good faith, he has done his duty under the act. The presumption in the absence of any evidence to the contrary is here, as in all other cases, that the parties are innocent rather than guilty. I do not believe, however, that the act contemplates a previous judicial determination of combination or conspiracy before the prohibition of purchase applies. It bottoms the prohibition upon the fact of combination or conspiracy and not upon a previous adjudication of that fact; and the terms of the act plainly imply that there may be such a combination or conspiracy. In view of this the Secretary might well require, as a condition of receiving any bid, an affidavit from the person, or a responsible representative of the firm or corporation proposing to deal with the Government, to the effect that such person, firm, or company was not engaged in such a combination, and might also, by appropriate stipulations in the contract, provide for its annulment if it were ascertained that it had been obtained by false representations in that respect; but the matter is one for the Secretary to determine according to his best judgment.

The second condition imposed is that "no purchase of structural steel, ship plates or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture."

How the actual cost of manufacture is to be ascertained, and what is a reasonable profit above that cost, the act does not determine, but leaves to the discretion of the Secretary.

There is nothing in the act to guide the discretion of the Secretary except the maximum cost prescribed, which, in the case of battle ships, is fixed at \$6,000,000.

It may be assumed that this maximum cost bears some relation to what Congress conceived to be the reasonable or proper cost of the ships. This consideration is emphasized by the fact that the limit of cost of the battle ship *Florida* is by the act increased \$400,000 above the amount originally fixed.

The act having in view the increase of the naval establishment of the United States, it is to be presumed that the work was intended to be carried forward with reasonable

expedition, and I can not therefore believe that it is imperative upon the Secretary "to detail a board of officers to go to the steel works and make several months' observations as to the various processes, etc., thus approximating to the actual cost of manufacture." He may be able in other ways to secure the needed information, which will serve every practical purpose as well as the way suggested. There must be men in the service of the Navy Department whose experience enables them to determine with practical precision what is the reasonable cost of manufacturing the articles designated.

What is a reasonable profit in any case is not a question of law, although the question often arises in courts of law for determination. The courts are called upon to determine whether rates prescribed for service rendered by public utility companies are or are not reasonable.

In such cases they ascertain the cost of rendering the service, and, having thus ascertained the resulting profit under the rates prescribed, they determine whether it is or is not reasonable. Six per cent has in such a case been held to be a reasonable return upon the capital invested, but stress was laid upon the fact that the business, the gas supply of a great city, was fairly secure against adverse changes and that the risk incident to it was reduced almost to a minimum. It was said in this case (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, L.C. 48, 49) that—

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less

right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference than can be obtained from an investment in government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated."

In the case you have to deal with there is no obligation upon anyone to render the service, and it is entirely a matter of contract. You can not fix the rate of profit; you can only refuse to enter into a contract if the price proposed involves an unreasonable profit.

The reasonable price or value of a service or commodity—other than the service of a public utility—is often presented in the courts for determination, and in such cases it is not ordinarily determined by resolving it into its elements of cost and profit, but with reference to the usual or prevailing price of the thing involved.

The market price of any commodity under normal conditions is taken to be its reasonable value; and so in any case where purchase can be made in an open market under conditions of free competition it may be assumed that the prevailing price will not be "in excess of a reasonable profit above the actual cost of manufacture."

Subject to the obligation to keep the cost of construction as much as possible within the limits of the maximum prescribed, Congress has committed the determination of what are reasonable prices for the various elements that enter into the construction of the ships to the sound discretion and the best judgment of the Secretary.

Respectfully, yours,

F. W. LEHMANN,  
*Solicitor General.*

Approved.

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

STEAMSHIP "EUROPA" CARRYING PASSENGERS INTO THE  
PORT OF NEW YORK WITHOUT CERTIFICATE OF INSPEC-  
TION.

The steamship *Europa*, a private vessel of Italian nationality, which was engaged in carrying passengers upon a regularly established line between the ports of the United States and European ports, sailed from the port of New York with a certificate of inspection but arrived back at New York more than 30 days after the expiration of such certificate, did not thereby violate any of the provisions of title 52, Revised Statutes, for the reason that foreign vessels are subject to inspection only when carrying passengers from the United States.

DEPARTMENT OF JUSTICE,

*March 24, 1911.*

SIR: Under date of the 7th instant you requested my opinion upon certain questions arising out of the following facts:

The steamship *Europa* is a private vessel, of Italian nationality, operating upon a regularly established line, carrying passengers between ports of the United States and European ports. She was inspected by the authorities of this Government, pursuant to the provisions of section 4400 of the Revised Statutes, and provided with a certificate of inspection dated September 18, 1909, due to expire September 18, 1910. On August 29, 1910, this certificate of inspection being then in force, the *Europa* sailed from the port of New York on a regular trip, but arrived back at New York, on the return voyage, October 26, 1910, more than 30 days after the expiration of such certificate.

You state that the case has been reported to your department in order that, if it is considered that the penalty imposed by section 4499 of the Revised Statutes for a violation of the inspection laws has been incurred, the usual steps may be taken looking to the collection thereof.

Upon this state of facts, my opinion is requested "as to whether, under the circumstances, the steamship *Europa* is subject to the provisions of section 4421, Revised Statutes, and particularly to the portion of said section added thereto by the act of June 25, 1910 (36 Stat. 831), and, if so, whether the vessel in question appears to have been navigated without complying with the terms of title 52



of the Revised Statutes, by reason of having been navigated without having on board an unexpired certificate of inspection or a temporary certificate of inspection."

Title 52 of the Revised Statutes relates to the regulation of steam vessels, and embraces sections 4399 to 4500, inclusive.

Section 4400, which specifies what vessels shall be subject to inspection, originally provided:

"SEC. 4400. All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title."

By the act of August 7, 1882 (22 Stat. 346), section 4400 was amended by adding thereto the following:

"And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections 4417, 4418, 4421, 4422, 4423, 4424, 4470, 4471, 4472, 4473, 4479, 4482, 4488, 4489, 4496, 4497, 4499, and 4500 of this title, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid."

Section 4400 was still further amended by acts of February 15, 1902 (32 Stat. 34), and March 17, 1906 (34 Stat. 68), by the addition of provisions authorizing certain exemptions in the matter of inspection of foreign vessels, in pursuance of reciprocal arrangements. You state, however, that no such exemption has existed in favor of the *Europa*, because of no reciprocal arrangement affecting the vessels of the country to which the *Europa* belongs.

Section 4417, which is one of the sections to which foreign vessels are subjected by the act of August 7, 1882, amending section 4400, relates to the inspection of the hulls and equipments of steam vessels, specifying the extent of such inspection, which is required to be made at least once a year. Section 4418 relates to the inspection of the boilers and their appurtenances, to be made at least once a year.

The other sections, except 4421, to which foreign vessels are subjected by the amendatory act of August 7, 1882, relate to various matters unnecessary to be considered in this connection.

The original provisions of section 4421, so far as pertinent, are as follows:

"SEC. 4421. When the inspection of a steam vessel is completed and the inspectors approve the vessel and her equipment throughout, they shall make and subscribe a certificate to the collector or other chief officer of the customs of the district in which such inspection has been made, in accordance with the form and regulations prescribed by the board of supervising inspectors."

The amendments of the above section consist only of additions thereto. The amendatory act of June 11, 1906 (34 Stat. 230), provides, in effect, that the inspectors shall, upon the inspection and approval of a vessel, furnish to the master or owner thereof a temporary certificate of inspection as evidence of such inspection until the regular certificate is delivered, and further provides in the last clause that "no vessel required to be inspected under the provisions of this title shall be navigated without having on board an unexpired regular certificate of inspection or such temporary certificate."

The amendment to section 4421 of June 25, 1910 (36 Stat. 831), consisted in the addition of the following provisions, relating to and modifying the clause last above quoted:

*"Provided, however,* That any such vessel, operated upon a regularly established line from a port of the United States to a port of a foreign country not contiguous to the United States, whose certificate of inspection expires at sea, or while said vessel is in a foreign port or a port of the Philippine Islands or Hawaii, may lawfully complete her voyage without the regular certificate of inspection or the temporary certificate required by this section, and no liability for penalties imposed by this title for want of such certificate shall be incurred until her voyage shall have been completed: *Provided,* That said voyage shall be so completed within thirty days after the expiration of

## 22 *Steamship Europa—Expired Certificate of Inspection.*

said certificate or temporary certificate: *Provided further*, That no such vessel whose certificate of inspection shall expire within fifteen days of the date of her sailing shall proceed upon her voyage to such port of a foreign country not contiguous to the United States without first having procured a new certificate of inspection or the temporary certificate required by this section."

The question of the liability of the *Europa* depends upon the construction to be given the act of August 7, 1882, amending section 4400 so as to require the inspection of certain foreign vessels. That act, which is above quoted, provides that "all foreign private steam vessels carrying passengers *from* any port of the United States to any other place or country" shall be subject to inspection. If this language means simply that foreign vessels are subject to our inspection laws only when carrying passengers "from" the United States, then the *Europa*, on her return voyage, was not being navigated in violation thereof. So construed, the *Europa* on her return voyage, was not a "vessel required to be inspected under the provisions of this title," within the meaning of the last clause of the amendment to section 4421 made by the act of June 11, 1906, which forbids such a vessel being navigated without having on board an unexpired regular or temporary certificate of inspection. For the same reasons, she is not within the further amendment to that section made by the act of June 25, 1910, which refers to "any such vessel," etc., and which necessarily can be given no broader construction than the preceding clause contained in the amendatory act of June 11, 1906, to which it relates.

It appears from a memorandum submitted by the Commissioner of Navigation that such has been the practical construction placed upon the amendatory act of August 7, 1882, by his office, which construction has always been adhered to up to the present time. This practice, the commissioner says, is based on the view that foreign countries are responsible for their own vessels carrying passengers from their ports, and the direct concern of the United States is with such vessels only when attempting to carry passengers from our ports.

I can perceive no sufficient reason for holding that a different construction should now be adopted. The language used is clearly susceptible of that construction. The legislative history of the act also confirms this view, as it shows that the purpose of the act was simply to subject foreign vessels to inspection *after* they had entered our ports.

I have the honor to advise you, therefore, that the navigation of the steamship *Europa*, under the circumstances stated, was not in violation of any of the provisions of title 52 of the Revised Statutes to which reference has been made.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

PANAMA RAILROAD—TRANSPORTATION OF ARTICLES MANUFACTURED IN PANAMA—TARIFF RATES.

Articles manufactured in Panama should be transported by the Panama Railroad Co. at the reduced freight rates provided for in article 20 of the agreement between the Republic of Colombia, now Panama, and the Panama Railroad Co., irrespective of whether the raw material from which they are made is of home or foreign production.

DEPARTMENT OF JUSTICE,

*April 1, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of January 27, 1911, in which you ask my opinion as to whether article 20 of the agreement between the Republic of Colombia, now Panama, and the Panama Railroad Co. includes articles manufactured in Panama from materials imported into that country from foreign countries.

The material facts, as they appear, are as follows:

In 1867 the Republic of Colombia made a concessionary agreement with the Panama Railroad Co., by article 20 of which it was stipulated that "Colombian productions shall be transported by the railroad during the first 20 years of this contract, paying one-half the rates of freight or transportation previously fixed by the company for foreign

products of the same class, but this term being concluded they shall pay a charge or freight not exceeding two-thirds of that previously fixed in the tariff of the company—tariff rates which the company can not increase in future in regard to Colombian productions.”

By an amendment of this contract August 18, 1891, this portion of article 20 was made to read as follows:

“From and after July 1, 1892, Colombian products passing over the Panama Railroad shall pay only half of the rate of freight established by the company for foreign products of the same class.”

The original agreement, with this amendment, is in the Spanish language, but the above quotations are from the accepted English translation.

Upon the separation of Panama from Colombia and the recognition of the former as an independent government, Panama became the successor of Colombia in this contract.

For a long time the railroad company limited the application of this contract to the natural products of the soil, mines, and waters. But this was mainly because there were then very few articles manufactured in that country, and not because this was the proper interpretation of article 20. In 1906 the question whether said article, as thus amended, referred to manufactured products as well as to natural products of the soil came in definite and specific form before the War Department and the Isthmian Canal Board, and it was decided that it did. This decision of the Secretary of War was reached after the most careful and deliberate examination, and was concurred in by the President, the Secretary of State, and the Canal Commission.

In his examination, the Secretary of War had the benefit of the opinion of Messrs. Sullivan and Cromwell, counsel for the Panama Railroad Co., rendered to that company on August 22, 1906, in which, after quoting the same English translation of article 20, as amended in 1891, as that above quoted, they say:

“The question which arises is whether these provisions apply to manufactured Colombian products, or only such products in their natural condition. We do not see any-

thing in the language of the contracts in question which justifies the restriction of their provisions to the natural products of the soil. The products of the industry of the Isthmus are, equally with the products of the soil, within the language used. Undoubtedly the backward state of manufactures in Colombia resulted in the application of the provisions of the contracts almost exclusively to natural products, there being substantially no manufactured products; but this resulted not from the terms of the agreement, but from the circumstances of the country. The words 'Colombian products' may as well include the products of Colombian manufacture as the products of Colombian soil.

"In fact, it appears that the practice of the company has been in accordance with the broader interpretation. It appears from the statement of Mr. Delevante, the local auditor of Panama, that for years back, among the articles which were recognized as entitled to the benefit of the lower rate were aerated waters, rum, seco, anisado, molasses, jars, native biscuits, leather, native liquors, fruit sirups, ice and bricks. It also appears from the special net local tariff issued on July 1, 1892, which was intended to cover articles entitled to the lower rate, that charcoal, lime, sugar and starch were also included. These are all manufactured articles. While many of them are the product of only a very elementary manufacturing process, yet there is no doubt that they are not natural products of the soil, and that they are manufactured articles.

"Since the language of the contracts is so broad and the practice of the company has been in accordance with an interpretation which would include, at any rate, some manufactured articles, we can see no reason for restricting the provisions of the contract to products of the soil, and our opinion is that the articles which are the products of Panamanian industry are equally entitled to the benefit of them."

Mr. Rogers, general counsel for the Isthmian Canal Board, in an opinion rendered to President Shonts on July 27, 1906, expressed himself as clear that the article referred to embraced manufactured products as well as natural

products. The conclusion reached was, on October 25, 1906, thus communicated by Mr. Shonts, chairman of the Isthmian Canal Commission, to Mr. Carlos C. Arosemena, chargé d'affaires of the Panama Legation:

"I am pleased to advise you that a conclusion has been reached to extend to Panamanian products, both of the soil and of manufacture, the reduced rates provided for by Article XX of the contract entered into between the Colombian Government and the Panama Railroad Co. July 5, 1867, as amended by article 1 of the agreement supplemental thereto, entered into between the railroad company and the Republic of Colombia August 18, 1891. Instructions to this effect have been forwarded to the railroad company."

This construction was at once accepted and agreed to by the railroad company, and no one disputes its correctness or seeks to change it.

But inasmuch as the manufactured products then under consideration were all made from raw materials produced in Panama, the question now is whether the same construction shall be extended to products manufactured from raw materials shipped into Panama from foreign countries.

The determination that the article in question refers to and includes manufactured as well as natural products, has gone very far toward an answer to this question. For, if the manufactured article is a product within the meaning of the article, it is so irrespective of the place where the material of which it is composed was obtained.

There are here two kinds of products—the raw material and the article made from it—and each is a "product" within the meaning of article 20. If the material is transported as such it must be the product of Panama in order to be carried on this reduced rate. So, if the manufactured article is transported, that manufactured article must be the product or manufacture of Panama.

In the commercial and business world the terms denoting the manufactured article and the material from which it is made are never confused. Thus, cloth is never called wool; bread is never called flour or wheat, and cigars are

never called tobacco; nor is wool ever called cloth, wheat or flour bread, or tobacco cigars. So, when in a contract or otherwise, a stipulation is made with reference to a manufactured article, it is always by general acceptance understood to refer to that article and not to the material of which it is made. And when cloth, bread, or cigars are offered for transportation, it is that article or product which is offered and not a different product, namely, the material of which it is composed.

If an article manufactured in Panama is a "product" of that country, it is so quite irrespective of the country from which the raw material came, and if articles manufactured in Panama are products of that country within this contract, then, as it is the article itself which is the subject of transportation, it is entitled to the half-rate charge specified, and none the less so because its raw material, if offered as such, would not have been entitled to that rate.

The natural products of Panama are those which are raised or produced there; just so, the manufactured products of Panama are those which are manufactured in that country. Natural products are mainly the productions of the soil. Manufactured products are the results of manufacture, and articles thus produced are equally the products of the country which produce them.

In my opinion there is nothing in this contract, or its subject matter, or in the language used, which will warrant the making of any distinction in this regard between articles manufactured in Panama from domestic material and such articles manufactured from raw materials imported from a foreign country.

I have, therefore, the honor to advise you that under the contract referred to articles manufactured in Panama should be transported by the Panama Railroad Co. at the reduced rate provided for in article 20, irrespective of whether the raw material from which they are made is of home or of foreign production.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.



FORM OF BOND OF ASSISTANT TREASURER OF UNITED  
STATES—RETROACTIVE FEATURE.

A bond voluntarily given by an assistant treasurer of the United States for the faithful discharge of the duties of his office, under section 3600, Revised Statutes, may be worded so as to operate retroactively.

Whether the new bond is retroactive or not, a full account of the money on hand should be made in order to fix the liability of the respective bonds in the event of defalcation.

DEPARTMENT OF JUSTICE,  
*April 7, 1911.*

SIR: Under date of February 23, 1911, you requested my opinion upon certain questions arising out of the giving of a new bond by the assistant treasurer of the United States at Boston, Mass.

1. Your first question is as follows:

“Assuming that the surety company on the new bond has authority under State laws, and would be willing to assume liability on a bond for the acts of an assistant treasurer committed before such bond was executed, will you please advise me whether the United States would properly be protected under the retroactive clause contained in the present form of bond or any similar clause which might be inserted with the full knowledge and consent of the surety?”

The authority for requiring a bond from the assistant treasurer is section 3600 of the Revised Statutes, which reads:

“SEC. 3600. All assistant treasurers, and all officers in any mint, or assay-office, authorized by law to act as assistant treasurers, shall, respectively, give bonds to the United States for the faithful discharge of the duties of their respective offices as assistant treasurers, according to law, and for such amounts as shall be directed by the Secretary of the Treasury, with sureties to the satisfaction of the Solicitor of the Treasury; and shall, from time to time, renew, strengthen, and increase their official bonds as the Secretary of the Treasury may direct.”

The condition of the present form of bond is as follows:

“Now, therefore, if the said ———— has truly and faithfully executed and discharged, and shall continue truly

and faithfully to execute and discharge, all the duties of said office of assistant treasurer of the United States at \_\_\_\_\_, according to law, and if the persons employed in his office shall perform with fidelity the duties of their respective offices; and moreover, has well, truly, and faithfully kept, and shall well, truly, and faithfully keep safely, without loaning, using, depositing in bank, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same shall be ordered by the proper department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made and shall faithfully and promptly make the same as directed, and has done and shall do and perform all other duties, as fiscal agent of the Government, which have been or may be imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law; and also has done and performed, and shall do and perform, all acts and duties required by law, or by direction of any of the executive departments of the Government, as agent for making any disbursements which either of the heads of those departments may be required by law to make and which are of a character to be made by a depository constituted by law, consistently with the other official duties imposed upon him, then this obligation to be void and of none effect; otherwise, it shall abide and remain in full force and virtue."

In several cases in the lower Federal courts the question you present was considered under statutes phrased as to the condition of the bond similarly to section 3600, and it was held that a bond covering in terms both past and future acts would be enforced only as to the latter, as the retro-active feature was in excess of the condition required by the statute (*Armstrong v. United States*, Peters, C. C. 46, Fed. Cas. No. 549; *United States v. Brown*, Gilp. 155, 182, Fed. Cas. No. 14663; *United States v. Ellis*, 4 Sawy. 590, 592, Fed. Cas. No. 15047; *United States v. Jones*, 77 Fed. 717.)

In my judgment, however, the decisions of the Supreme Court of the United States lead to a different conclusion. It is true that court has held that no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding his office, that he should execute a bond with a condition different from that prescribed by law (*United States v. Tingey*, 5 Pet. 114, 129); but in the same case and in the same connection it was said that "it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office." It was also directly adjudged in that case that "a voluntary bond, taken by authority of the proper officers of the Treasury Department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law" (ib., p. 128). This principle has been repeatedly affirmed (3 Notes, U. S. Repts. 161).

In *Jessup v. United States* (106 U. S. 147, 152) the court, referring to *United States v. Tingey* (*supra*), *United States v. Bradley* (10 Pet. 343), *United States v. Hodson* (10 Wall. 395), and *United States v. Linn* (15 Pet. 290), says (p. 152):

"These authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law."

It was accordingly held that a bond given to the United States and not to the Treasurer of the United States, as required by the statute, was a valid and binding obligation.

So the court of appeals for the sixth circuit, in an opinion delivered by Justice Lurton, held a contractor's bond, although invalid as a statutory bond, was valid as a

common law obligation. (*Stephenson v. Monmouth Min. & Mfg. Co.*, 84 Fed. 114.)

It is true that in *United States v. Bradley* (10 Pet. \*343, \*364) the court said, of the bond there involved, that for any excess beyond the statute it would be void *pro tanto*. This statement is to be read in connection with the preceding paragraph of the opinion, in which it is said that "doubtless it would be illegal for that department to insist upon a bond containing other provisions and conditions *differing* from those prescribed or required by law," the court holding that even in such a case the bond would not be wholly void if taken in the form not prescribed by the act by mutual mistake or accident and wholly without design.

In the present case the form of bond in question does not in my judgment contain provisions or conditions differing from, or in any wise inconsistent with, those prescribed or required by law. Section 3600 of the Revised Statutes provides that the officers referred to shall "give bonds to the United States for the faithful discharge of the duties of their respective offices as assistant treasurers, according to law." It further provides that they "shall, from time to time, renew, strengthen, and increase their official bonds as the Secretary of the Treasury may direct."

The manifest purpose and intent of the statute is that the United States shall be fully secured for the faithful discharge by assistant treasurers of their duties, and therefore it is in entire conformity with the purpose of the act to require that a bond given by such an officer shall cover his entire term. It frequently occurs, however, that the public interests require that an officer enter upon the discharge of his duties before he is able to give the requisite bonds, or, as the statute contemplates, a new bond may be necessary to increase or strengthen existing bonds. To hold, therefore, that in such a case the bond could not be made to cover his prior service, even if voluntarily given, would be to say that the statute requires the Government to go unprotected to that extent. It seems to me that such a view is contrary to sound principles of public policy,

and is not required by any consideration of justice or protection to the official who gives the bond, which seems to be the basis upon which the inferior Federal courts rested their decisions.

So far from taking the view suggested, the Supreme Court has expressed itself directly to the contrary. (*Farrar v. United States*, 5 Pet. 373; *United States v. Boyd*, 15 Pet. 187.) In both those cases the bond referred to was required by statute. In deciding the *Boyd* case, the court said (15 Pet. 207-208):

“The first question arising on the pleadings is whether the sureties of Boyd are bound for defalcations between the 27th of December, 1836, the date of the appointment, and the 15th day of June, 1837, the date of the bond. The condition of the bond is prospective, and in its last clause does not differ in effect from that passed on in the case of *Farrar v. United States* (5 Pet. 374, 389). In that case, William Rector had been appointed surveyor of public lands, and given bond with sureties, conditioned, ‘if the said William Rector shall faithfully execute and discharge the duties of his office, then said bond to be void,’ etc. Rector had been appointed and commissioned as surveyor, on the 20th February, 1823. The bond bore date the 7th day of August, 1823. The prominent question presented on the trial was, whether the sureties of Rector were liable for moneys received by him as surveyor, and appropriated to his own use, after his appointment, and before the execution of the bond; on which the court held, that the sureties could only be made answerable for moneys in Rector’s hands at the date of the bond, which were held by him in his official capacity, in trust for the Government, and not for moneys previously appropriated to his own use. Say the court, ‘if intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct.’”

\*                      \*                      \*                      \*                      \*

“It is insisted on behalf of the United States, that aside from the foregoing considerations, the sureties are bound equally with the principal in the bond, on the ground, that the condition, on settled legal principles, and by implica-

tion, is retrospective, and covers all defaults of the officer, from the date of the commission; because it is recited, and part of the obligation, that Boyd had been appointed receiver for four years from the 27th day of December 1836. We have with much care considered this position, and think it can not be sustained. This court held, in *Miller v. Stewart* (9 Wheat. 680), that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded on this ground. The principal ones relied on in that case have been relied on in the present; and we think the principles settled by them preclude the court from maintaining that the sureties are liable by implication, contrary to the plain prospective obligation of the bond, 'that the said Boyd shall faithfully execute and discharge the duties of his office.' In the language of the court, in *Farrar v. United States*, 'if intended to cover past dereliction, the bond should have been made retrospective in its language.'"

It may be suggested that the observations of the court in both of these cases were dicta on the point in question, as the bonds there referred to were held not to cover prior transactions; but however that may be, it is manifest the court perceived no impropriety in making the bond retrospective in its operation. If it had done so, it could have disposed of the question as to the construction of the language of the bond upon that ground. See also *United States v. Boyd* (5 How. 29, 47), where the ruling on the first appeal in this case is restated.

There is a manifest difference between holding that a condition in a bond that an officer shall faithfully execute the duties of his office can not be held to operate retrospectively, and saying that like language in a statute requiring such a bond would prohibit a bond taken after the officer had entered upon his duties from being so worded as to cover his prior service. In the one case, justice to the surety requires that such language be held to be prospective only. In the latter case, where the bond is expressly worded so as to

operate retrospectively, to uphold it according to its terms certainly can not be said to work any hardship upon the surety, while to annul it in this particular would be to compel the Government to go unprotected for the period of the service so covered, although the plain purpose and intent of the statute is that the Government shall be protected for the entire term of the officer.

This case differs from that of *United States v. Bradley, supra*, in that the bond there in question extended, according to the contention of counsel, to other responsibilities than those required by the statute—the bond enjoining that the principal should well and truly discharge all his duties as paymaster, while the law only required him to give bond to account, and he had many other duties. (10 Pet. \*352.) The court did not decide that that bond exceeded the statute (ib. \*358, \*364), but whether it did so or not, it is clear in the present case that a bond covering the prior service of the officer is simply in line with the manifest purpose of the statute, that the Government shall be fully protected during his entire term.

Answering your first question, therefore, I beg to advise you that, in my judgment, a bond voluntarily given by an assistant treasurer of the United States in the form now used would be good as to the retroactive feature.

2. You also ask whether, if the bond of the assistant treasurer were only prospective, a full account of the money on hand would be necessary in order to fix the liability of the respective bonds in the event of defalcation.

In view of what has been said in answer to the first question, it is perhaps unnecessary to say anything on this point. This is really a matter of evidence, and it would seem that, whether the new bond is retrospective or not, such a count should always be made. (*United States v. Boyd*, 5 How. 29, 49; *United States v. Eckford's Executors*, 1 How. 250, 260–263.) It appears from your letter that the regulations prescribed by the Comptroller of the Treasury under your direction, as authorized by section 5 of the act of July 31, 1894 (28 Stat. 206), are to this effect, and that such has been the practice of the Treasury Department in order to avoid any dispute between the sureties as

to which bond is liable in the event of default. It is also to be observed that the new bond is merely cumulative, the former bond remaining in full force throughout the term of his office. (26 Op. 70; Throop on Public Officers, sec. 215.) This being so, it would seem advisable to adhere to the present practice.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

---

PURCHASE OF TORPEDOES FROM COMBINATION OR MONOPOLY—CONSTRUCTION OF COLLIERS—EIGHT-HOUR LAW.

The purchase of Whitehead torpedoes, to be paid for from the appropriation "Torpedoes and appliances" in the naval appropriation act of March 4, 1911 (36 Stat. 1271), can not be made, by a provision in the same act, from a company that has combined or conspired to monopolize the interstate or foreign commerce of the United States, provided torpedoes and appliances are properly classified under the head of "armor, armament or machinery," but this is a question of fact, rather than one of law, to be determined by the Secretary of the Navy. The provision in the act of March 4, 1911 (36 Stat. 1288), under the head of "Construction and machinery," establishing an eight-hour workday, has reference to the construction of battleships and not colliers, and the fact that a contractor for one of the battleships may also contract for one or more colliers would not require the work on the colliers to be carried on on an eight-hour-a-day basis.

The word "herein" when employed in an act of Congress ordinarily and unless the context makes necessary a different construction means "in this act."

DEPARTMENT OF JUSTICE,

*April 11, 1911.*

SIR: I have to acknowledge receipt of your favor of the 4th instant, in which you advise me that your department has before it for signature, in accordance with an award recently made, a contract with the Whitehead Torpedo Works, of Weymouth, England, for 180 Whitehead torpedoes, to be paid for from the appropriation "Torpedoes and appliances: For the purchase and manufacture of torpedoes and appliances," in the naval appropriation act of March 4, 1911 (36 Stat. 1271), under the heading "Bureau of Ordnance."



1. You call my attention to the provision in the same act under the heading "Increase of the Navy," as follows:

"That no part of any sum herein appropriated shall be expended for the purchase of structural steel, ship plates, armor, armament or machinery from any persons, firms or corporations who have combined or conspired to monopolize the interstate or foreign commerce or trade of the United States, or the commerce or trade between the States and any Territory or the District of Columbia, in any of the articles aforesaid, and no purchase of structural steel, ship plates or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture. But this limitation shall in no case apply to any existing contract."

You say that the department is in doubt as to whether the word "herein" as used in the paragraph last quoted should be construed as meaning "in this act," or should be restricted as applying only to the part of the act embodied under the heading "Increase of the Navy," wherein specific appropriations for several items are made. You therefore ask my opinion as to whether, if the proposed contract for Whitehead torpedoes were entered into, your department would be forbidden to expend any of the appropriation "Torpedoes and appliances," referred to above for the purchase of such armament until satisfied that the Whitehead company has not combined or conspired to monopolize foreign or domestic commerce or trade of the United States as provided in the provision quoted above under the heading "Increase of the Navy."

The word "herein" when employed in an act of Congress ordinarily and unless the context makes necessary a different construction means "in this act." The act making appropriations for the naval service for the fiscal year ending June 30, 1912, and for other purposes, appropriates various sums of money "for the purchase of structural steel, ship plates, armor, armament, or machinery." Some of the sums so appropriated are found under the heading "Bureau of Ordnance," some under the heading "Bureau of Steam Engineering," but principally under the heading of "Increase of the Navy." But wherever found in the act

the language of the proviso is explicit that no part of any sum "herein," i. e., "in this act" appropriated shall be expended for the purchase of such structural steel, ship plates, armor, armament, or machinery from the class of persons designated.

The appropriation for the purchase and manufacture of torpedoes and appliances is found under the head of "Bureau of Ordnance," under which there is appropriated a sum of money "for procuring, producing, preserving, and handling ordnance material; for the armament of ships \* \* \*," etc. Clearly the part of the sum appropriated under that heading is a portion of "any sum herein appropriated" for the purchase of armament within the meaning of the proviso above quoted, and if torpedoes and appliances are properly classified as "armament or machinery," then the provision in the proviso is applicable to and a restriction upon the expenditure of the moneys appropriated under the head of "Torpedoes and appliances." Whether or not torpedoes and appliances are properly classified under the head of "armor, armament, or machinery," is a question of fact, rather than one of law, which your department is better qualified to determine than is this one. If torpedoes are properly so classified, then, in my opinion, the Navy Department is by the act under consideration forbidden to expend any of the appropriation for the purchase and manufacture of torpedoes and appliances proposed to be purchased from the Whitehead company until satisfied that that company has not combined or conspired to monopolize the interstate or foreign commerce or trade of the United States, or the commerce or trade between the States and any Territory or the District of Columbia in "structural steel, ship plates, armor, armament, or machinery;" and no purchase of the same can be made at a price in excess of a reasonable profit above the actual cost of manufacture, unless such purchase be made under any contract existing on March 4, 1911—the date of the passage of the act.

2. You further invite my attention to a provision in the said act under the head of "Increase of the Navy," "Construction and machinery," viz, the third proviso

38 *Purchase of Torpedoes—Colliers—Eight-Hour Law.*

after the appropriation "On account of hulls and outfits of vessels and steam machinery of vessels heretofore and herein authorized" (36 Stat. 1288), which proviso reads as follows:

*"Provided, That no part of this appropriation for the construction and machinery of battleships shall be expended for construction of any battleships by any person, firm or corporation which has not at the time of the commencement and during the construction of said vessels established an eight-hour workday for all employees, laborers and mechanics engaged, or to be engaged in the construction of the vessels named herein."*

You say that the department is about to publish an advertisement inviting proposals for the construction of two fleet colliers authorized by said act for the "Increase of the Navy," and has in preparation a circular giving information as to the chief characteristics of said vessels essential to the shipbuilders in preparing proposals for the construction thereof, and that the prices to be named for building these colliers will be materially affected by the question as to whether or not the work is to be done on the eight-hour-a-day basis; and it is necessary that prospective bidders be informed in advance of the construction placed by the department on the question as to the application of the eight-hour workday limitation embodied in said act. You therefore request my opinion as to whether, if a builder with whom a contract should be made for constructing one of the colliers authorized by said act, should also obtain the award of the contract for constructing one of the battleships provided for by the act, he would, as a condition for receiving payment for the battleship, be obliged to establish an eight-hour workday for all employees, laborers, and mechanics engaged, or to be engaged, in the construction of the collier.

Under the head of "Increase of the Navy," the President is authorized to have constructed two first-class battleships, two fleet colliers, and certain other designated vessels. Under the head of "Construction and machinery," there is appropriated a certain sum of money "on account of hulls and outfits of vessels and steam machinery of

vessels heretofore and herein authorized." No part of this appropriation "for the construction and machinery of battleships," it is enacted, shall be expended for construction of "any battleship" by any person, etc., who has not at the time of the commencement and during the construction of "said vessels," i. e., said battleships, established an eight-hour workday for all employees, etc., engaged, etc., "in the construction of the vessels named herein." In this instance the word "herein" clearly means "in this paragraph." To give to it the usual meaning of "in this act" would amplify the application of the paragraph far beyond its express language, which is specifically limited to battleships in the opening clause of the paragraph.

Such construction would extend the limitation far beyond the intention of Congress as expressed in the language used. The debates on the subject in Congress confirm my views of the proper construction of the act. They show that the bill was purposely so framed as to enable the colliers to be built without the eight-hour limitation. In presenting the bill Mr. Foss pointed out the fact that in the act of May 13, 1908, Congress had provided for the building of two fleet colliers (one to be built in a Government navy yard on the Pacific coast), putting a limit upon their cost of \$900,000, raised the following year to \$1,000,000 in the case of the Government-built collier, but that that ship could not be built for that amount under the law requiring it to be built in a Government navy yard, where it costs more to build than in a private yard.

Mr. Foss said:

"In the act of June 24, 1910, last year, Congress authorized two fleet colliers of the same speed and capacity as those heretofore mentioned, the cost not to exceed \$1,000,000 each, and provided that the eight-hour law should apply to their construction. No bids were received for those colliers from eastern yards, but one bid was made by the Union Iron Works, of San Francisco, to build one at \$1,596,500, and there was an irregular bid from Moran & Co., of Seattle, of \$887,000, but that was unaccompanied by any check or bond for performance. This bid of Moran & Co. was thrown out, but these colliers we have not been

40 *D. C.—Correction of Records Relating to Land Titles.*

able to construct by reason of this eight-hour limitation, which was placed upon the construction of these colliers in the last Congress \* \* \*.

"Two more colliers were authorized last year, and they were required to be built under the eight-hour law, at \$1,000,000 each. As it costs more to build under the eight-hour law than it does without any restriction of that kind, it has been impossible to get any bids for building these two colliers, and so to-day we have practically these two colliers with the one on the Pacific coast held up by legislative restriction \* \* \*.

"So much for the situation with regard to colliers. Now, I wish to take up the subject of battleships, and, I may say, in this bill we put in a provision here under 'Increase of Navy' which allows the Secretary of the Navy to build these colliers by private contract and without the eight-hour limitation \* \* \*." (Cong. Rec., 61st Cong., 3d sess., p. 3142.)

I therefore answer your second question in the negative. The fact that a contractor for one of the battleships may also contract for one or more colliers would not require the work on the colliers to be carried on on an eight-hour-a-day basis. That requirement is limited to the construction of a battleship.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

---

DISTRICT OF COLUMBIA—CORRECTION OF RECORDS OF  
WAR DEPARTMENT RELATING TO LAND TITLES.

The authority of the Secretary of War to make correction of the records of the War Department in respect of certain lots in the District of Columbia, provided for by section 2 of the act of March 3, 1899 (30 Stat. 1346), was not suspended by section 26 of the act of May 30, 1908 (35 Stat. 543), creating a commission "for the purpose of investigating the title of the United States in and to all lands in the District of Columbia."

Section 26 of the act of May 30, 1908 (35 Stat. 543), is entirely consistent with section 2 of the act of March 3, 1899 (30 Stat. 1346), and the latter provision is not repealed by the former.

DEPARTMENT OF JUSTICE,

*April 13, 1911.*

SIR: I have your letter of April 6, 1911 (J. A. G. O. 6136), in which, with reference to the application of Mrs.

Clara Cox Dawson for correction of the records of the War Department relating to lot 114, part of original lot 8, square 153, in the city of Washington, so as to show the title to the said lot to be in her, you ask the following questions:

1. Whether the operation of section 2, of the act of March 3, 1899, is suspended by section 26 of the act of May 30, 1908, so that the War Department is at the present time and pending the execution of said section 26, without authority to make the correction of the records in the Dawson case and in similar cases.

2. Whether section 26 of the said act of May 30, 1908, had the effect of repealing by implication section 2, of the said act of March 3, 1899, so that this application for the correction of the records under the earlier act should be disposed of under the later act of May 30, 1908.

The pertinent language of the acts referred to in the questions thus stated is as follows:

Act approved March 3, 1899 (30 Stat. 1346):

"SEC. 2. That the Secretary of War be, and he is hereby, authorized and directed to correct the records of the War Department in respect of any of the lots mentioned in Senate Document Numbered Two hundred and seventy-seven, Fifty-fifth Congress, second session (being a letter from the Secretary of War transmitting, in compliance with the resolution of the Senate of January twenty-seventh, eighteen hundred and ninety-eight, a letter from the Chief of Engineers, together with list of lots in the city of Washington, District of Columbia, the title to which the records of his office show to be in the United States, and list of lots in the city of Washington, District of Columbia, which are shown by the records of his office to have been donated by the United States), upon the filing by an actual occupant of any of the lots mentioned in said document sufficient proof that the said occupant or the party under whom he claims has been in actual possession of the said lot or lots for an uninterrupted period of twenty years, so that said records shall show the title to said lots to be in the said occupant."

With regard to the Senate document named in the foregoing extract, it should be said that subsequently to the

42 *D. C.—Correction of Records Relating to Land Titles.*

passage of the act above mentioned, the Secretary of War transmitted to the United States Senate a corrected list of lots, the title to which the records of the office of Chief of Engineers show to be in the United States, and this list was printed in a reprint of Senate Document No. 277, Fifty-fifth Congress, second session, with explanatory correspondence as Senate Document No. 106, of the Fifty-sixth Congress, second session. This correction, however, is not material in the present case for the reason that the parcel of land affected by the present consideration, namely, lot 8, of square 153, is contained both in the original and in the corrected list.

Prior to this enactment there seems to have been no statute under which title by prescriptive right or adverse possession to lands in the District of Columbia could be asserted as against the United States. The act of 1899, in effect, enacted that actual occupation for an uninterrupted period of 20 years of one of the lots described in the list transmitted by the Chief of Engineers and set forth in the Senate document referred to, should afford a conclusive presumption of title in the occupant as against the United States, and that upon his filing sufficient proof of such occupation, the records of the War Department should be corrected so as to show title to the lots so occupied in such occupant.

Section 26 of the public buildings act of May 30, 1908 (35 Stat. 543), created a commission—

“for the purpose of investigating the title of the United States in and to all lands in the District of Columbia, with a view to protecting such title, filing a map of said lands, and ascertaining whether or not any individual or corporation is, without proper authority, occupying, in whole or in part, any such lands.”

The commission was also directed to investigate and report on transfers of title to lands by the United States, either by authority of Congress or otherwise, and to make recommendations as to the future policy of the Government with respect to the sale or retention of any lands, title to which is in the United States, and pending its report—

"unless otherwise directed by Congress, all authorizations heretofore made for the sale of Government land in the District of Columbia, in which conveyances have not been made or contracts entered into, shall be held in abeyance."

It is quite clear that the act of 1899 makes no provision for the sale of any Government land in the District of Columbia. It contemplated neither contracts nor conveyances. It dealt entirely with the results of uninterrupted occupation of lands for 20 years, and the correction of the War Department records to conform with such results, viz, title in the occupant.

The commission created by the act of 1908, in its investigations, may be called upon to investigate the rights of occupancy of occupants who, having been in actual possession for 20 years, are entitled under the act of 1899 to record title, and it would seem that Congress should have suspended that right pending the investigation directed to be made by the commission as well as the sale of lands pursuant to previous authorization by Congress. But Congress did not so act and, indeed, failed afterwards when the commission called its attention to such omission, to take any steps to correct it. It is not competent to supply by administrative construction a clear failure by Congress to legislate in a comprehensive, logical manner upon a subject concerning which a law has been passed.

I have therefore to answer your first question in the negative.

2. Answering your second question, I am of the opinion that the act of March 3, 1899, was not repealed by the act of May 30, 1908. The two statutes are entirely consistent with each other. The first one deals with the effect of 20 years' occupancy of certain lots of land enumerated in a designated report and the correction of records in the War Department so as to conform with the result declared by the statute. The latter act deals with the subject of a general inquiry into titles of the United States to *all* lands in the District of Columbia, and holds in abeyance all previous authorizations for *sales* of lands in the District where neither contract nor conveyance has been executed. The



44     *Purchase of Structural Material for Vessels.*

two acts are in *pari materia* and may each be carried out and given full effect without impairing the obligation of the other.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

---

PURCHASE OF STRUCTURAL MATERIAL FROM COMBINATIONS OR MONOPOLIES.

The provision of the naval appropriation act of March 4, 1911 (36 Stat. 1289), that no part of the money therein appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament, or machinery" from any combination or monopoly refers only to purchases made directly by the Navy Department.

DEPARTMENT OF JUSTICE,

*April 14, 1911.*

SIR: I am in receipt of your letter of the 13th instant, in which, referring to my opinion dated the 11th instant, construing the application of the proviso in the naval appropriation act of March 4, 1911 (36 Stat. 1289), concerning the purchase of structural steel, etc., from persons, firms, or corporations who have combined or conspired to monopolize interstate or foreign commerce, you suggest that inasmuch as that provision of law prohibits the expenditure of the appropriation for the purchase of the material affected, it would seem that only purchases made directly by the Navy Department itself are comprehended, and not such purchases as may be made by shipbuilders to carry out contracts for the delivery of vessels; and you ask my confirmation or correction of your impression.

The provision of the statute in question only applies to "the purchase of structural steel, ship plates, armor, armament or machinery from any persons, firms or corporations," etc. The subject being dealt with is the purchase by the Government of structural steel, etc., from persons, firms, or corporations, and, of course, the purchase pursuant to the provision of law. The statute does not concern itself with the purchase of materials, etc., by those

persons, firms, or corporations referred to in the statute from others with whom they may deal. I therefore confirm your impression that it is only purchases made directly by the department itself which are comprehended within this provision.

The principles of an opinion which I rendered you under date of July 8, 1910, respecting the application of the provisions of the naval appropriation act of June 26, 1910 (28 Op. 358) and the cases cited in that opinion confirm this view of the statute at present under consideration.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

EMPLOYMENT OF OFFICERS IN THE NAVY OR MARINE CORPS BY PARTY FURNISHING NAVAL SUPPLIES OR WAR MATERIAL TO THE GOVERNMENT PROHIBITED.

The employment of any officer in the Navy or Marine Corps on the active or retired list by any person or company furnishing naval supplies or war material to the Government is prohibited by a provision in the naval appropriation act of June 10, 1896 (29 Stat. 361).

DEPARTMENT OF JUSTICE,

*April 18, 1911.*

SIR: I am in receipt of your favor of 15th instant, asking for an interpretation of a provision in the naval appropriation act of June 10, 1896 (29 Stat. 361), reading as follows:

“\* \* \* That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed, after June thirtieth, eighteen hundred and ninety-seven, by any person or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after said date \* \* \*.”

It is quite clear from a reading of that enactment that the employment of any officer in the Navy or Marine Corps on the active or retired list by any person or company furnishing naval supplies or war material to the

Government is prohibited. If the Navy Department, in order to assist in the extension of United States trade and commerce and to carry out the general purposes indicated in the application by the Department of State, thinks fit to send an officer of the Navy, skilled in matters of ordnance, to a South American capital, it is entirely competent for the Secretary of the Navy to direct him to be sent, not as the representative of a private person or company, nor in its employment, but at the expense of the Government as a representative of the Navy Department and for the purpose of assisting all Americans whose interests are such as, in the opinion of the Secretary, to justify that proceeding.

It is believed that this communication answers your inquiries, although, perhaps, not quite in the categorical form in which they are made. I am,

Respectfully, yours,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

SECRETARY OF THE NAVY—PARTIAL PAYMENTS UNDER  
GOVERNMENT CONTRACT—ATTORNEY GENERAL'S  
OPINION.

The Attorney General declines to answer the question whether the Navy Department would be justified in continuing to make partial payments under contracts in the event of the repeal of the clause in the naval appropriation act of March 4, 1911 (36 Stat. 1267), which authorizes the Secretary of the Navy to make partial payments on work done under contracts for public purposes, as no case involving that question is now pending before that department.

The general rule would seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments.

DEPARTMENT OF JUSTICE,

*April 18, 1911.*

SIR: I am in receipt of your letter of 17th instant, advising me that it is proposed by Joint Resolution No. 1 of the present session of Congress to strike from the naval appro-

priation bill of March 4, 1911 (36 Stat. 1267), the clause authorizing the Secretary of the Navy to make partial payments from time to time during the progress of the work under contracts made under the Navy Department for public purposes, not in excess of 90 per cent of the value of work already done, etc.; and asking my opinion as to whether, in the event of the repeal of that clause, the Navy Department would be justified in continuing to make partial payments as provided for in existing contracts made prior to March 4, and in providing for such payments under future contracts for ships, armor plate, and other objects.

It is an old-established rule that where no actually existing case is presented, but the Attorney General is asked for his opinion upon a future hypothetical case, he declines to answer the question. (19 Op. 414; 20 Op. 288; id. 729.) If the joint resolution referred to should pass, and a question should then be presented arising before you for determination, I will then take pleasure in advising you.

It is perhaps proper, however, to state that Attorney General Brewster advised the Secretary of the Navy, by an opinion dated January 22, 1885 (18 Op. 105), that section 3648 of the Revised Statutes does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor, its object being to prevent payments being made to contractors in advance of the performance of their contracts, whether for services or supplies.

In 1894 Attorney General Olney advised the Secretary of the Treasury that section 3648, Revised Statutes, prevented the making of partial payments on account of work performed in the construction of a revenue cutter where neither the statute under which the work was done nor the contract gave the Government the ownership of the boat before its completion, or a lien on the uncompleted vessel for such part payments. He mentioned the fact that the contracts for building vessels for the Navy Department contained special stipulations giving the United States a lien upon the work done and paid for. (20 Op. 746.) This decision was followed by the Comptroller of the

Treasury in the matter of partial payments on account of a contract to manufacture and sell powder for the use of the Army. (17 Comp. Dec. 231.)

The general rule would therefore seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments.

I am, respectfully, yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

ACQUISITION BY THE UNITED STATES OF A SITE FOR THE  
ARANSAS LIFE-SAVING STATION.

Under the provision in the act of March 3, 1875 (18 Stat. 372), which authorizes the Secretary of the Treasury to acquire, by donation or purchase, the right to use and occupy sites for life-saving stations, the fee-simple title to land may be purchased for the Aransas life-saving station provided for by the act of June 18, 1878 (20 Stat. 163).

DEPARTMENT OF JUSTICE,

*April 20, 1911.*

SIR: I return herewith your correspondence with the governor of Texas with respect to the acquisition by the United States of a piece of land on Mustang Island, Nueces County, Tex., as a site for the Aransas life-saving station. I have carefully examined the question which was raised by the Comptroller of the Treasury respecting the authority of the Secretary of the Treasury to acquire or purchase the fee-simple title to this land. This question arises out of the following legislation:

Section 3736, Revised Statutes, provides:

"No land shall be purchased on account of the United States, except under a law authorizing such purchase."

The act of March 3, 1875 (18 Stat. 372), authorizes the Secretary of the Treasury:

"Whenever he shall deem it advisable, to acquire, by donation or purchase in behalf of the United States, the

right to use and occupy sites for life-saving or life-boat stations, house of refuge and sites for pier-head beacons the establishment of which has been, or shall hereafter be, authorized by Congress."

The act of June 18, 1878 (20 Stat. 163), empowered the Secretary of the Treasury—

"to establish additional life-saving and life-boat stations at or near the following-named points upon the sea and lake coasts of the United States, namely, \* \* \* at or near Aransas Pass."

Pursuant to this authority, the Secretary of the Treasury has negotiated with the State of Texas for the acquisition of a site for the life-saving station above referred to. The price has been agreed upon and a patent prepared and tendered by the State of Texas to the United States which purports to convey the fee simple in the land to be so acquired. This deed is issued under the provisions of article 372, revised civil statutes of Texas of 1895, and is specifically authorized by the act of the legislature of Texas approved April 24, 1907. (Session acts of 1907, p. 320.)

The Comptroller of the Treasury raises the question whether or not, under the statutory authority to acquire the right to use and occupy sites for the purposes indicated, the Secretary of the Treasury may lawfully acquire and pay for the fee to the land. It will be observed that there is no limit in the act of 1875 to the term of the use and occupation, the right to which may be acquired. Clearly the Secretary of the Treasury would be authorized, within the express language of this act, to accept a lease on the land for 999 years. Such a lease, however, is for all imaginable purposes a fee-simple estate. (*Montague v. Smith*, 13 Mass. 396, 403.)

In the very recent case of *J. W. Perry Co. v. City of Norfolk* (220 U. S. 472), decided by the Supreme Court of the United States, Mr. Justice Lamar says:

"The court of appeals held that in Virginia the general rule that the landlord is responsible for the taxes 'has no application to the case of a perpetual leaseholder where the tenant is in effect the virtual owner of the property and

## 50 *Aransas Life-Saving Station—Acquisition of Land.*

entitled to its use forever. For the purposes of taxation the mere legal title remaining in the landlord will be disregarded.' It adopted that part of the language in *Wells v. Savannah* (87 Ga. 397), affirmed in 181 U. S. 531, where, in speaking of the liability of one who had a perpetual lease and a right to convert it at will into a fee, Judge Bleckley said: 'The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being.'"

Inasmuch, therefore, as by the language of the statute quoted, the Secretary of the Treasury might acquire in the form of a lease what is in effect and to all imaginable purposes a fee, it is not perceived why he can not accept conveyance of the fee directly without resorting to a circumlocution which would accomplish the same thing. The purpose in view is the acquisition of a site for a life-saving station. The term of necessity for such use is indefinite and uncertain. The grant of the fee will secure the right to use and occupy the site so long as the Government may find it necessary to do so. The acquisition of the right for a shorter time might be entirely inadequate to the needs of the Government. The State of Texas has provided for the conveyance of a fee, and the purpose to be served under the act of Congress is, to say the least, as fully advanced by acquiring the right to perpetual use and occupation through the conveyance of the fee as it would be by the acquisition of the right to use and occupy for some restricted period.

The general principle of law is that, "whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied." (1 Kent, 464.)

The appropriation act of March 3, 1875 (18 Stat. 458), provided that \$100,000 shall be used for and applied toward the construction of a removable dam, or a dam with adjustable gates. Attorney General Devens advised the Secretary of War with respect to that provision:

"In my opinion that provision impliedly authorized the purchase, with the approval of the Secretary of War, of

such land as is necessary for the construction of the dam. This view rests upon the well-established rule of interpretation, that whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied." (15 Op. 213.)

The act making appropriations for the support of the Army for the fiscal year ending June 30, 1899 (30 Stat. 323), under the head of "Transportation of the Army and its supplies," authorized the expenditure of a specified sum for certain purposes named under the said head, and among others "in opening roads and building wharves." In 22 Opinions, Assistant Attorney General Boyd advised the Secretary of War that the said provision of said act "impliedly authorizes the Secretary of War to purchase, on account of the United States, such land as in his judgment may be necessary for the erection of a wharf or wharves, as contemplated by the appropriation, and that land so purchased on account of the United States can be lawfully paid for from the said appropriation." (22 Op. 667.)

Upon the foregoing considerations I am of the opinion that the Secretary of the Treasury is fully authorized to accept the conveyance tendered by the State of Texas of the fee to the tract to be occupied by the Aransas life-saving station, and to pay the consideration fixed therefor, viz, the sum of \$750.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

---

ACQUISITION BY THE UNITED STATES OF A SITE FOR THE  
ARANSAS LIFE-SAVING STATION—APPROPRIATION.

The language of the provision in the sundry civil appropriation act of June 25, 1910 (36 Stat. 711), out of which payment must be made for the acquisition of land for the Aransas life-saving station, justifies the purchase of said land from that appropriation.

DEPARTMENT OF JUSTICE,

*April 21, 1911.*

SIR: Since addressing you under date of 20th instant with respect of the power of the Secretary of the Treasury



to acquire from the State of Texas land for the Aransas Pass Life-Saving Station, my attention has been called to the language of the current appropriation act out of which payment must be made.

In the sundry civil act for 1911 (act of June 25, 1910, 36 Stat. 703, 711), appropriation is made, among other things, under the head of "Life-Saving Service" for "fuel for stations and houses of refuge; repairs and outfits for same; rebuilding and improvement of same, including use of additional land where necessary \* \* \*

"For establishing new life-saving stations and lifeboat stations on the sea and lake coasts of the United States, authorized by law, to be available until expended \* \* \*."

The proposed acquisition of additional land at Aransas Pass is for the purpose of affording a site for an additional building or additions to the existing buildings of the life-saving station at that point, and the expense of the acquisition of the right to use the additional land made necessary by such rebuilding is payable out of the appropriation of \$2,037,040, made by the act above referred to, and must be justified by the appropriation in the language above quoted. It is not perceived that there is any material difference between the right to acquire "use and occupation" for the particular purposes under consideration, and the right to acquire "use of additional land where necessary" for the particular purpose mentioned, and the same reasoning which led to the conclusion expressed with regard to the general language referred to in my opinion dated April 20 would apply with equal force to the expenditure out of the current appropriation above referred to.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

---

#### COMMEMORATION OF THE FIFTIETH ANNIVERSARY OF THE ISSUANCE OF THE EMANCIPATION PROCLAMATION.

It is within the power of the President to issue a general proclamation calling the attention of the people of the country to the fiftieth anniversary of the issuance of the emancipation proclamation and inviting them to unite in an appropriate celebration of that event.

If, however, it is desired that especial national observance be paid to the anniversary of the issuance of the emancipation proclamation by making it a legal holiday and providing for appropriate services under national auspices, the matter should be brought to the attention of Congress, to the end that the appropriate enactment be had by the passage of a bill or joint resolution.

## DEPARTMENT OF JUSTICE,

*April 26, 1911.*

SIR: A petition has been presented to you, signed by a number of prominent colored citizens, requesting that you issue a proclamation setting aside the 22d day of September, 1912, as a day of jubilee throughout the United States, in commemoration of the fiftieth anniversary of the issuance of the emancipation proclamation by President Abraham Lincoln, forever abolishing slavery in the United States. This petition is referred to me by your direction, with a request for an expression of my opinion as to your powers to issue such proclamation.

There would seem to be no doubt whatever of your power to issue a proclamation requesting the citizens throughout the Nation to commemorate by appropriate observances the event referred to in the petition. Such action was taken by President Grant in issuing a proclamation inviting the people of the United States on the 4th of July, 1876, "in addition to the usual observances with which they are accustomed to greet the return of the day, further, in such manner and at such time as in their respective localities and religious associations may be most convenient, to mark its recurrence by some public religious and devout thanksgiving to Almighty God for the blessings which have been bestowed upon us as a Nation during the century of our existence, and humbly to invoke a continuance of His favor and of His protection." (19 Stat. 664.)

Such are the annual proclamations which the President is accustomed to issue, designating a day as one of general thanksgiving, and calling upon the people on that day, laying aside their usual vocations, to repair to their churches and unite in appropriate services of praise and thanksgiving to Almighty God. (See, e. g., 36 Stat. 2503.) It is not within the power of the President,

however, to make by such proclamation, without the authority of Congress, a legal holiday of the day so designated. Such holidays, in so far as they allow the employees of the Government leave of absence with pay, are always established by act of Congress or joint resolution. (See 21 Stat. 304; 23 Stat. 516; 24 Stat. 644.)

Congress by act approved March 2, 1889, "in order that the centennial anniversary of the inauguration of the first President of the United States" might be commemorated, declared Tuesday, April 30, 1889, "to be a national holiday throughout the United States," and by the same act made suitable provision for ceremonies in commemoration of that event. (25 Stat. 980.) If, therefore, it is desired that especial national observance be paid to the anniversary of the issuance of the emancipation proclamation by making it a legal holiday, and providing for appropriate services under national auspices, the matter should be brought to the attention of Congress, to the end that the appropriate enactment be had by the passage of a bill or joint resolution; but it is within the power of the President to issue a general proclamation calling the attention of the people of the country to the event, and inviting them to unite in an appropriate celebration of its anniversary.

Very respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

---

#### LIABILITY OF OWNERS OF VESSEL FOR HOSPITAL CHARGES AND TRANSPORTATION OF DISABLED SEAMAN.

An American seaman, disabled in the service of the vessel and who was left in a hospital at a foreign port, is entitled to medical expenses incident to a recovery from the injury and transportation back to the United States, and where these expenses are paid out of funds belonging to the United States, after notice to the owners of the vessel that they were liable for the same and demand made for payment, the owners of the vessel may be held liable therefor.

DEPARTMENT OF JUSTICE,

*May 2, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of February 15, 1911, in which, and in the

documents accompanying the same, appear the following facts:

Oscar Frederickson, an American seaman, one of the crew of the American brig *Geneva*, sailing from San Francisco, had his leg seriously injured in the performance of his duty on such vessel. He received no medical attention for 10 days, when the vessel arrived at Tahiti, Society Islands, in May, 1910. His leg was then in a very serious condition, and he was wholly incapacitated for duty. The master of the vessel applied to the then American consul in that port for the discharge of the seaman for this cause, but the consul declined to discharge him. The master then placed the man in the hospital there, promising that the owners of the vessel would pay the reasonable charges for his care and treatment for a reasonable time, and proceeded with the vessel on his voyage. The seaman was never discharged from his contract of service until with the rest of the crew he was discharged at San Francisco at the close of the return voyage in July following. The owners of the vessel then deposited the wages due him to that time with the United States Shipping Commission at San Francisco; and also continued to pay the hospital charges until September 23, some time after his discharge. Then, after giving notice to the hospital authorities and the consul, they refused to pay any further expenses, and also refused to pay for the transportation of Frederickson to the United States, claiming that the consul should have discharged him, when such expenses would have been properly borne by the United States under section 4581, Revised Statutes, as amended. Upon such refusal, the consul agreed with the authorities to pay these hospital charges from the fund for the relief of destitute seamen, which he has done, and has likewise paid for Frederickson's transportation to the United States; and his acts in this respect have been approved by the State Department. However, before making these payments by direction of the State Department, the consul notified the Matthew Turner Co., the owners of the vessel, that they were primarily liable for same, and sent them bills therefor, which they refused to satisfy.

The question which you submit is, whether the United States can recover from the owners of this vessel the sums so paid.

While it is stated that the master of the vessel applied to the consul for the discharge of Frederickson, and that the consul refused the application, yet the ground of the application and the reason for the refusal are not given.

Section 4580, Revised Statutes, as amended by the act of June 26, 1884, chapter 121, section 2 (23 Stat. 54), reads as follows:

“Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this act.”

It will be observed that the causes for which a consul may discharge a seaman on the application of the master are not here stated, but it appears to be recognized that a consul may discharge a seaman at the instance of the master for any cause sanctioned by the usages and principles of maritime law as recognized in the United States. (*The T. F. Oakes*, 36 Fed. 442.) Some of the reasons justifying a discharge are stated in an opinion of Attorney General Griggs dated September 20, 1898 (22 Op. 212), and in the opinion of Judge Deady in *The T. F. Oakes*, *supra*.

There is nothing in your communication or the documents accompanying same which indicates that Frederickson had been guilty of any misconduct, or that the injury which he received was a result of his gross negligence; and hence the presumption is that the application of the master for his discharge was correctly refused by the consul, and section 4581, Revised Statutes, as amended

by section 16 of the act of December 21, 1898 (30 Stat. 759), has no application to this matter.

This being true, the owners of the vessel were liable, not only for the seaman's wages up to the termination of the voyage, but also for all expenses incident to medical care, nursing, and attendance necessary to a recovery from the injury. This does not mean that the expenses shall be borne until a complete cure is effected, as such recovery may be impossible; but it does mean that this liability exists until the condition of the seaman is such that he can be properly discharged from medical attention.

In *The J. F. Card*, 43 Fed. 92, Judge Brown (subsequently Mr. Justice Brown) expressed a doubt that the shipowner could be held liable for medical attention after the termination of the voyage, citing in support of this view *Nevitt v. Clarke*, Olcott 316; *The Ben Flint*, 1 Biss. 562; *The Atlantic*, Abb. Adm. 451; and *The City of Alexandria*, 17 Fed. 390; and he refused to charge the owner with such expenses when the injury occurred on a voyage upon the northern lakes, drawing a distinction between such voyages and ocean voyages.

But this view has not been adopted by the Federal courts. In *The Osceola*, 189 U. S. 158, 175, the opinion in which was delivered by the same learned justice, in laying down certain settled propositions of maritime law, it was said that:

"The vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure and to his wages, at least so long as the voyage is continued;" which shows that the Supreme Court had not adopted the view which the learned justice had formerly expressed, and that the question remained undetermined.

It has been subsequently held that the owners' liability for medical treatment to injured seamen does not cease with the termination of the voyage, in the following cases:

*McCarron v. Dominion Atlantic Ry. Co.* (opinion by Judge Lowell), 134 Fed. 762; *The Svealand* (C. C. A., 4th cir.) 136 Fed. 109; *The Henry B. Fiske* (opinion by Judge Dodge), 141 Fed. 188, 191; *The Mars* (C. C. A., 3d cir.), 149 Fed. 729.

A well-considered opinion upon this question, in which the same view was taken was delivered by Judge Brown of the southern district of New York in *The W. L. White*, 25 Fed. 503, decided shortly after the passage of the amendment of 1884.

The holding in these cases rests largely upon the authority of Mr. Justice Story's opinion in *Reed v. Canfield*, 1 Sumn. 195, 203, and seems to be now generally adopted by the courts, and in my opinion they declare the correct principle.

It is also well settled that the owner of the vessel is liable for the expense of transportation home of a seaman left in a hospital in a foreign port. *Callon v. Williams*, 2 Lowell 1; *Brunent v. Taber*, 1 Sprague 243; *The Centennial*, 10 Fed. 397.

As the medical and transportation expenses here in question have all been settled out of funds belonging to the United States, and as they were paid to relieve a distressed seaman, and after notice had been given to the Matthew Turner Co. that they were primarily liable for same and demand made for payment, it is my opinion that said company may be held liable therefor.

This conclusion is, of course, based on the assumption that there was no legitimate reason for the consul to discharge Frederickson at the instance of the master of the vessel.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

---

NATIONAL BANKS COLLECTING PURCHASE PRICE OF INTOXICATING LIQUORS SHIPPED FROM ONE STATE INTO ANOTHER—CRIMINAL CODE, SECTION 239.

Section 239 of the Criminal Code, which prohibits the collection of the purchase price of intoxicating liquors by a person acting in connection with the transportation thereof from one State into another, does not apply to banks, collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business.

Where consignments of liquor are made to fictitious persons and the bills of lading, with drafts attached, are sent to a bank with such instructions that the goods are delivered to anybody who will pay the draft and accept the goods, even though the person to whom the goods are delivered has not previously ordered the liquor, such a transaction would constitute a sale by the bank and the bank in such a case would be amenable to discipline by the State for selling liquor contrary to the State law, and also to discipline by the Federal authorities for selling liquor without compliance with the provisions of the internal-revenue laws.

Such a business, moreover, is clearly beyond the powers of a national bank, and if the Secretary of the Treasury is satisfied that there is any considerable amount of dealing of that character by banks, he might well issue a general warning to them against engaging in such *ultra vires* transactions.

DEPARTMENT OF JUSTICE,

*May 3, 1911.*

SIR: I am in receipt of your letter of 25th ultimo, transmitting to me a copy of an opinion of the Secretary of the Treasury, dated April 10, 1911, replying to a suggestion that the attention of the national banks be called by proper circular to the provisions of section 239 of the Criminal Code of the United States (35 Stat. 1088) and of their application to certain transactions hereinafter referred to. This section reads as follows:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."



The chief special officer of the Bureau of Indian Affairs, writing to the Commissioner of Indian Affairs, refers to a conference which he had had with the attorney general of Oklahoma concerning the enforcement of this act, and in his letter states that a practice has grown up of shipping alcoholic and intoxicating liquors from the State of Missouri, where dealing in such liquors is permitted by law, into the State of Oklahoma, where such traffic is prohibited by law. The method of carrying on the business is described in a bill in equity filed in the United States circuit court for the eastern district of Oklahoma in December, 1909, quoted in the letter of the chief special officer for the Indian Bureau in the following language:

"That their principal method and custom of making shipments into other States, including the State of Oklahoma, is to receive mail orders for said shipments from its customers outside the State for sales and shipments of liquors to be made in Missouri, and directed to such other States. That after said orders are accepted by complainants, they are delivered at Kansas City, Mo., to various railroad companies and other common carriers transporting freight from said State of Missouri to such other States, and more particularly to various points in the State of Oklahoma, where said customers reside. That in all cases where goods are sold and delivered to the carrier in Kansas City in the State of Missouri, the said sales are made outside of the State of Oklahoma and the goods are delivered to the common carrier for the purpose of making delivery to the consignee only.

"Complainant further shows that after delivering said liquors to the carriers for shipment as aforesaid in said State of Missouri to Oklahoma, they receive from the carrier a bill of lading, which bill of lading is generally made out in the following form, substantially, and forward said bill of lading to a bank or some responsible person at the home of the consignee, attached to which is a sight draft for the purchase price of the liquor. The customer pays the draft and receives the bill of lading, and presents the same to the railroad company and receives the shipment. This method, as above stated, is known to the

railroad and to the public generally by the various terms of 'shippers' order,' 'order notify,' and 'sight draft and bill of lading' method. On each box or package thus sent out is marked with either the full name or initials of the consignees and a specific number; that the bill of lading contains the full name of the consignee together with the number marked upon the box or package. The bill of lading used by complainants reads as follows:

"Received from Harvest King, in apparent good order, the following articles marked below to be delivered in like good order: Kansas City, Mo., \_\_\_\_\_, 190 \_\_\_\_\_ by \_\_\_\_\_ R. R. To shippers' order, notify \_\_\_\_\_ at \_\_\_\_\_ Marks.

| No. | Article. | Weight. |
|-----|----------|---------|
|-----|----------|---------|

Return shipment in ten days if not accepted.

Freight prepaid No.'

"The railway company, or the common carrier, fills in the blanks so as to agree with the dates, name of purchaser, character of goods, and the name of the consignee to be notified and the point in the State of destination named in the bill of lading, and the custom and understanding between the parties to said transaction is that it gives to the shipper the right to stop said goods at any time before said goods are delivered to the purchaser at their destination in Oklahoma, and before the surrender of the bill of lading, and the goods are not delivered to said purchaser or consignee until they arrive at their destination, and are not delivered to the consignee until the production and surrender of the said bill of lading."

Upon this statement of facts, the chief special officer of the bureau requests that the Comptroller of the Currency be asked to call the attention of the national banks in the State of Oklahoma to section 239 of the Criminal Code, with the advice that the conduct of business as above described is in violation of its provisions. The Secretary of the Treasury expresses the opinion that, under the strict rule of construction applied to criminal statutes, banks are not violating the law by collecting the purchase price of liquor shipped in the course of business described above,

although a bill of lading be attached to the check or draft used as the means of collection, but, stating that the question is one more properly for the determination of this department, asks that the matter be submitted to me for an opinion as to the application of the statute quoted.

I concur in the opinion of the Secretary of the Treasury that the words of the statute "in connection with the transportation" qualify all of the following provisions of the section. Section 239 of the Criminal Code enacted March 4, 1909 (35 Stat. 1136), was passed as a step to regulate interstate commerce in intoxicating liquors, extending the principle embodied in the act of August 8, 1890 (26 Stat. 313), which, in effect, withdrew the protection of Congress from the sale of liquor in the original package by the consignee of an interstate shipment. It was intended to prevent express companies or common carriers from collecting from the consignee or purchaser of liquor shipped from one State into another any amount except the fees for transportation.

As stated by Mr. Houston in the debate in the House of Representatives when the bill was on its passage:

"It puts a stop to the shipment of liquors c. o. d., and thus prevents express or railroad agents from collecting pay for liquor and from becoming virtually the agents of the liquor dealers in selling their goods." (Cong. Rec., 60th Cong., 2d sess., v. 45, pt. 3, p. 2584.)

In brief, it provides that no carrier or other person shall, in connection with the transportation of intoxicating liquors from one State into another, collect the purchase price thereof or act as agent for either buyer or seller in completing the sale, save only in the actual transportation and delivery of the goods. The act does not apply to banks, collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business and is not connected with the transportation of the property within the meaning of the statute under consideration. The act does not pro-

hibit the purchase of liquor in one State to be shipped into another; it does not prescribe payment in cash or at the counter of the dealer; it plainly contemplates that liquor may be bought and paid for in any manner except as specifically forbidden by the act. It prohibits railroad companies, express companies, or other common carriers or other persons, in connection with such transportation, from collecting the purchase price "before, on, or after delivery from the consignee or from any other person," or from otherwise acting as the agent of the buyer or seller of any such liquor for the purpose of buying or selling or completing the sale thereof. The act is restricted in its application to persons who in collecting act "in connection with the transportation." This certainly does not include the vendor himself; and yet, in a sense, he is connected with the transportation, for he delivers the goods to the carrier to be transported. The bank merely collects a draft remitted to it for collection, and upon payment of the draft delivers the bill of lading to the payer of the draft. The statute obviously contemplates that its prohibition shall apply to a person who, in connection with the transportation of the liquor, collects the purchase price or otherwise in any manner acts as agent of the buyer or seller of the liquor for the purpose of completing the transaction. Obviously, the bank, which merely receives a draft and presents it to the drawee for payment and on payment delivers the security for the draft, is in no manner acting in connection with the transportation of the goods.

The abuse aimed at by the law was the so-called c. o. d. shipments by express, which were, in effect, local sales at the place of delivery. In many instances the consignees were fictitious; anyone who went to the express office and paid the charges was enabled to carry away the liquor. This business is effectually prohibited by the act.

It is, however, suggested in the papers transmitted that a similar practice has grown up in evasion of the law, in that the vendor, instead of consigning the goods through an express company c. o. d., ships them by rail, draws on a drawee from whom an order may have been received, and forwards the draft, accompanied by the bill of lading,

to a local bank for collection; and that this is precisely the same practice which it is sought to prohibit through the provisions of section 239. It may be granted that the practice is as reprehensible as that which is condemned by the provisions of the section quoted, but those provisions deal very specifically with a mode of business which is not identical with that shown to exist by the papers submitted, and which latter method was undoubtedly devised for the purpose of evading the prohibition of section 239.

It is further suggested that, under this practice, consignments of liquor are now made to fictitious persons, and that the bills of lading, with drafts attached, are sent to a bank with such instructions that the goods are delivered to anybody who will pay the draft and accept the goods, even though the person to whom the goods are delivered has not previously ordered the liquor. Such a transaction would be a sale by the bank and at the bank, although not a sale in connection with the transportation of the liquor from one State to another; and the bank in such case would seem to be clearly amenable to discipline by the State for selling liquor contrary to the State law, and also to discipline by the Federal authorities for selling liquor without compliance with the provisions of the internal-revenue laws. Such a business, moreover, is clearly beyond the powers of a national bank, and if the Secretary of the Treasury is satisfied that there is any considerable amount of dealing of that character by banks, he might well issue a general warning to them against engaging in such *ultra vires* transactions.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

---

COPYRIGHT LAW—RIGHTS OF ALIEN AUTHORS AND  
COMPOSERS.

The provision at the end of section 8 of the copyright act of March 4, 1909 (35 Stat. 1077), which requires the President to determine by proclamation the existence of the reciprocal conditions upon which alien authors and composers may acquire the general privileges under said act, applies equally to the reciprocal condition specified in the

proviso to section 1 (e) of that act, upon which an alien may acquire the right of controlling the parts of instruments serving to reproduce mechanically a musical work.

Where a German citizen has complied with all the general provisions of the copyright act at any time subsequent to July 1, 1909, the date upon which the act became effective, there was vested in him the rights and privileges set forth in said act, except the right specified in section 1 (e), as Germany had at that time complied with one or more of the conditions enumerated in section 8, subsection (b).

A German citizen who has strictly complied with the provisions of the copyright act at any time between July 1, 1909, the date upon which the law became effective, and April 9, 1910, the date of the proclamation of the President declaring that the citizens of Germany were entitled to the general privileges of that act, is not only vested with a copyright in his work or composition, but he may maintain an action for any infringement which occurred between said dates.

With reference to an infringement of the particular right specified in the proviso to section 1 (e) between September 9, 1910, and December 8, 1910, the same principle must apply; but as the proclamation of the President does not recite that this condition had been met prior to the date of the proclamation it would not afford evidence sufficient to sustain an action for infringement between said dates.

A German citizen could not acquire the right specified in the proviso to section 1 (e) of said act prior to September 9, 1910, the date upon which the reciprocal condition provided for therein was complied with by Germany.

DEPARTMENT OF JUSTICE,

*May 6, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of March 3, 1911, in which you propound a number of questions relating to the rights that may be acquired by alien authors and composers under the copyright law of March 4, 1909. (35 Stat. 1075.) While some of these questions are entirely abstract, yet I think that answers to them all will appear from the conclusions reached with reference to the rights of citizens of Germany whose copyright laws and the proclamations of the President relating thereto are as follows:

The laws of the German Government have complied with one of the reciprocal conditions mentioned in section 8, subsection (b) of the copyright act ever since that act went into effect on July 1, 1909, and that country was among those included in the proclamation of the President, made April 9, 1910, which declared that the citizens of the coun-

tries mentioned therein were entitled to the privileges of the copyright law as of July 1, 1909. However, the reciprocal condition as to music, provided in section 1 (e), was not complied with by Germany until September 9, 1910, and the proclamation of the President declaring that this condition had been met was issued December 8, 1910. This proclamation recited that satisfactory official assurance had been given that Germany "now permits to citizens of the United States similar rights to those accorded in section 1 (e) of the act of March 4, 1909," but did not mention the date upon which such similar rights were granted.

The questions presented by this state of facts are:

1. Is it the duty of the President to determine by proclamation the existence of the reciprocal condition specified in the proviso of section 1 (e).

2. What rights, if any, could a German citizen, who was a nonresident of the United States, acquire under the general provisions of the copyright law between July 1, 1909, the date upon which the copyright act of March 4, 1909, became effective, and April 9, 1910, the date of the proclamation of the President declaring that the citizens of Germany were entitled to the general privileges of that act.

3. What rights, if any, could such German citizen acquire under the special provision in section 1 (e) between September 9, 1910, the date upon which the reciprocal condition provided for therein was complied with by Germany, and December 8, 1910, the date of the proclamation issued by the President declaring such fact; and

4. Could a citizen of Germany acquire the right specified in the proviso to section 1 (e) prior to September 9, 1910.

The general provisions of the act relating to the privileges of alien authors and composers to secure copyrights of their works in the United States are contained in section 8 of the act, which reads as follows:

"That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act: *Provided, however,* That the copyright secured by this

act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

“(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

“(b) When the foreign state or nation of which such author is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright by the terms of which agreement the United States may, at its pleasure, become a party thereto.

“The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this act may require.”

The first section of the act provides that:

“Any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right.

\* \* \* \*

“(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights.”



Does the provision at the end of section 8, requiring the President to determine the "reciprocal conditions aforesaid," by proclamation, apply to the restriction upon aliens contained in section 1 (e)?

This presents another of the many difficult questions of construction which have arisen in the enforcement of this act. It must be conceded that this provision is remote from section 1 (e), that it relates directly to the preceding provisions in section 8 and that it contains nothing which *necessarily* requires its extension to the condition expressed in section 1 (e). However, here, as in every question of statutory construction, it is necessary to consider all parts of the act relating to the subject under consideration, and to determine therefrom as nearly as possible the legislative intent. That there is a close relationship in the subject matter of section 1 (e) and of the proviso to section 8, is apparent. The latter relates to the conditions upon which an alien may acquire the general privileges under the act, while the former specifies a particular condition upon which an alien may acquire the right of controlling the parts of instruments serving to reproduce mechanically a musical work. This condition is in a way dependent upon the conditions set forth in section 8, inasmuch as it may be complied with, and yet the right to control the parts of the instruments mentioned could not be acquired unless some one of the conditions prescribed in the latter section is also met; that is, the condition relating to this particular matter is added to those set forth in section 8. It is reciprocal in its nature, just as those in class (b) of section 8 are reciprocal. Every reason which prompted the insertion of the clause in section 8 relating to the proclamation by the President, applies equally to the proviso in section 1 (e). Without the specification of some method by which it may be determined whether the laws of a foreign country comply with this particular condition, the general public could possess no adequate knowledge as to whether a copyright of a musical composition carried with it the protection of the right declared therein, and the proof of such right in actions for infringement would often be uncertain and difficult to obtain.

There can be but little doubt that Congress intended that the requirement that the existence of "the reciprocal conditions aforesaid" shall be determined by the President of the United States, should apply to the reciprocal requirements specified in section 1 (e), and that it was not there expressed because it was assumed that the language of the concluding clause of section 8 implied that all reciprocal conditions upon which the right of foreign authors or composers depend, should be determined and proclaimed by the President.

I hold, therefore, that it is the duty of the President to determine and proclaim what foreign countries grant to the citizens of the United States rights similar to those specified in the provisions of section 1 (e).

The remaining questions may be discussed and determined together.

In an opinion transmitted to you from this department on March 19, 1910 (28 Op. 222, 226), with reference to whether a proclamation of the President issued under section 8 of this statute might be made retroactive, it was said:

"It will be observed that the determination of the specified conditions of the foreign laws and the proclamation of the President made with reference thereto does not *create* the right of foreign authors and proprietors to enjoy the rights and privileges of our copyright laws, but that such proclamation is only the *evidence* of the existence of the conditions under which those rights and privileges may be exercised. It is true that the absence of such proclamation is conclusive evidence that such rights do not exist, while, on the other hand, the proclamation is conclusive evidence that they do exist; but, nevertheless, the proclamation is not a condition precedent to the existence of the rights themselves. Therefore, there is no reason why such proclamation may not be retroactive in its effect; and, consequently, if a proclamation were made showing the determination of fact by the President that either of the conditions required in the statute have been complied with since a specified date, such proclamation would be conclusive evidence of that fact, and the citizens or subjects of such country

would be entitled to avail themselves of our copyright laws from the date mentioned in the proclamation.”

Another careful consideration of the provisions of the act relating to this subject but confirms in my mind the view there expressed.

Germany having complied with one or more of the conditions set forth in section 8, subsection (b), on or before July 1, 1909, at any time thereafter and independent of the President's proclamation, a German citizen could acquire the rights declared by the act of March 3, 1909, by a compliance with its terms. It is true that, in the absence of the President's proclamation, he could not obtain a registration of his claim to copyright; but under this statute registration is not a necessary prerequisite to the existence of the rights and privileges of copyright, as they are vested by a compliance with the conditions of the statute by the author or composer.

Hence, I am of the opinion that where a German citizen complied with all the general provisions of the act at any time after July 1, 1909, there was vested in him the rights and privileges set forth in the act, except the right specified in section 1 (e) which will be hereinafter considered.

An important question, however, is whether, after the issuance of the proclamation on April 9, 1910, he acquired any remedy for an infringement upon his copyright between the dates mentioned. As above said, there can be no doubt that prior to the proclamation no action could be maintained for an infringement, because of the absence of the essential evidence to sustain such action. But it does not follow that when the evidence became available it could not be used to maintain an action brought to enforce a right which had previously existed. For illustration, it is familiar law that a deed, though inadmissible for the want of registration, may yet be registered and introduced as evidence to sustain an action brought before its registration.

A more difficult question, however, is whether an infringer would have an equitable defense to an action for infringement between the dates mentioned, on the ground

that he did not possess at the time of the infringement any legitimate notice of the existence of the copyright.

Section 9 of the act requires that notice shall be affixed to each copy of the work or composition published, and prescribes precisely the character of such notice. The existence of this notice upon each copy certainly informs every person examining the same that the author or composer claims a right to a copyright therein, which embraces the claim that the country of which he is a citizen has complied with one or more of the reciprocal conditions specified in the law. Therefore, after such claim is made and notice thereof is given, it is not inequitable that anyone who shall undertake thereafter to infringe upon the rights of such author or composer, shall be required to do so at his own risk. It is practically impossible for the President to be informed whether the conditions required by the act have been complied with on the very day upon which the compliance is had. It must require some time, and often a considerable time, for the information to be transmitted through the proper channels and for the proclamation relating thereto to be prepared and published. Hence, when a copyright is claimed by an alien author or composer in strict accord with the provisions of the statute, everyone must be aware of the fact that the absence of the proclamation is not conclusive evidence that the reciprocal conditions have not been complied with by the country of such alien, and any infringement in the meantime is made subject to the knowledge that the President may determine by proclamation thereafter issued that compliance was had prior to the infringement.

I am of the opinion, therefore, that if a German citizen strictly complied with the provisions of the act at any time between July 1, 1909, and April 9, 1910, he is not only vested with a copyright in his work or composition, but that he may maintain an action for any infringement which occurred between said dates.

With reference to an infringement of the particular right specified in the proviso of section 1 (e) between September 9, 1910, and December 8, 1910, the same principle must apply; but it will be observed that the proclamation of the

President does not recite that this condition had been met prior to the date of the proclamation; and therefore the proclamation would not afford evidence sufficient for the maintenance of an action for infringement between said dates. It is apparent, therefore, that when a proclamation is issued by the President, the precise date upon which the foreign country brought itself within the conditions of the act should be stated.

With reference to the fourth question, it is clear that the right specified in the proviso to section 1 (e) could not be acquired by any German citizen prior to September 9, 1910.

The reciprocal condition therein provided was a necessary prerequisite to the acquiring of the right mentioned. Previous to that date the condition of the German citizen, in so far as that particular right was concerned, was precisely the same as if the act did not exist.

Respectfully,

J. A. FOWLER,  
*Assistant Attorney General.*

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

#### LIFE-SAVING MEDALS—BARAC RIVER, P. I.

The Secretary of the Treasury is empowered by the act of January 21, 1897 (29 Stat. 494), to bestow life-saving medals for signal exertions made in saving persons from drowning in the Barac River, a nonnavigable stream of the Philippine Islands, since that river is under the jurisdiction of the United States by virtue of the sovereignty of the United States over said islands.

DEPARTMENT OF JUSTICE,  
*May 9, 1911.*

SIR: Under date of April 5, 1911, you referred to me certain papers received by you from the Secretary of War in regard to awarding Capt. Louis J. Van Schaick, United States Army, a medal for saving a member of his company from drowning in the Barac River, P. I., on September 5, 1901, with a request for my opinion whether such a medal might properly be awarded him under the provisions of existing law.

It would have been preferable if the facts of this case and the question of law arising thereon had been specifically stated in the request for an opinion (22 Op. 351, 477; 23 ib. 92); but I gather from the papers, which are not voluminous, that the specific issue is whether the fact that the Barac River is a nonnavigable stream of the Philippine Islands excludes this case from the operation of the laws relating to the award of life-saving medals.

Section 7 of the act approved June 20, 1874 (18 Stat. 125, 127), entitled "An act to provide for the establishment of life-saving stations and houses of refuge upon the sea and lake coasts of the United States, and to promote the efficiency of the Life-Saving Service," provides:

"SEC. 7. That the Secretary of the Treasury is hereby directed to cause to be prepared medals of honor, with suitable devices, to be distinguished as life-saving medals of the first and second class, which shall be bestowed upon any persons who shall hereafter endanger their own lives in saving, or endeavoring to save lives from perils of the sea, within the United States, or upon any American vessel: *Provided*, That the medal of the first class shall be confined to cases of extreme and heroic daring; and that the medal of the second class shall be given in cases not sufficiently distinguished to deserve the medal of the first class: *Provided, also*, That no award of either medal shall be made to any person until sufficient evidence of his deserving shall have been filed with the Secretary of the Treasury and entered upon the records of the department."

Section 12 of the act approved June 18, 1878 (20 Stat. 163, 165), entitled "An act to organize the Life-Saving Service," provides:

"SEC. 12. That the Secretary of the Treasury is hereby authorized to bestow the life-saving medal of the second class upon persons making such signal exertions in rescuing and succoring the shipwrecked, and saving persons from drowning, as, in his opinion, shall merit such recognition."

This legislation was amended by the act of May 4, 1882 (22 Stat. 55, 57), in certain particulars which it is unnecessary here to consider.

The above-quoted provisions, in view of their incorporation in the acts relating to the Life-Saving Service, having been given a restricted construction by Attorney General Olney in an opinion rendered January 30, 1895 (21 Op. 124), Congress passed the act entitled "An act construing the acts of Congress in relation to the award of life-saving medals," approved January 21, 1897 (29 Stat. 494), which reads:

"Whereas the Attorney General, under date of January thirtieth, eighteen hundred and ninety-five, has rendered an opinion that the statutes authorizing the award of life-saving medals apply to the rescue of those persons only who, in the vicinity of a life-saving station, lifeboat station, or house of refuge, are in danger of drowning in any of the waters over which the United States, *by reason of their right to regulate foreign and interstate commerce*, [italics mine] have jurisdiction, and that the purpose of such statutes is to cause such medals to be bestowed upon the members, whether regular or volunteer, and whether permanent or temporary, of the life-saving crews; and that the terms 'succoring the shipwrecked' and 'saving persons from drowning,' employed in section twelve, act approved June eighteenth, eighteen hundred and seventy-eight, authorizing the bestowal of life-saving medals of the second class, were intended to embrace only those persons who were suffering from the perils of the sea, either by actual shipwreck or from being upon or connected with any vessel in distress: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That so much of the acts relating to life-saving stations and the Life-Saving Service approved June twentieth, eighteen hundred and seventy-four, June eighteenth, eighteen hundred and seventy-eight, and May fourth, eighteen hundred and eighty-two, as provide for the award of life-saving medals shall be construed so as to empower the Secretary of the Treasury to bestow such medals upon persons making signal exertions in rescuing and succoring the shipwrecked and saving persons from drowning in the waters over which the United States has jurisdiction, whether the

said persons making such exertions were or were not members of a life-saving crew, or whether or not such exertions were made in the vicinity of a life-saving station."

It will be observed that this act, in defining the waters to which the acts relating to the award of life-saving medals shall apply, omits the phrase "by reason of their right to regulate foreign and interstate commerce," qualifying the jurisdiction of the United States, which is mentioned in the preamble as having been contained in the opinion of the Attorney General of January 30, 1895. The fact that this phrase was omitted from the construing act, that such a qualification is not in terms contained in the acts construed, and that the evident purpose of the construing act was to give the acts construed the most liberal interpretation, all lead to the conclusion that such legislation should be held to apply to any waters over which the United States has jurisdiction, whether because of its power to regulate interstate and foreign commerce or otherwise.

This was the view taken by Attorney General Griggs, in an opinion rendered April 2, 1900 (23 Op. 78, 80), construing the act of January 21, 1897, in which he said:

"It will be noted, also, that the act of January 21, 1897, was passed to correct a construction by one department of the Government which Congress, then at least, deemed too narrow, and to give to this legislation a broader scope. In doing this, Congress has plainly made the territorial extent of this legislation as broad as the waters over which the United States has jurisdiction. For, in correction of a previous construction, fixing much narrower limits, Congress has extended the legislation to all 'the waters over which the United States has jurisdiction, \* \* \* or whether or not such exertions were made in the vicinity of a life-saving station.' And all places which either are or are not 'in the vicinity of a life-saving station' clearly embrace all places 'in the waters over which the United States has jurisdiction.' And it extends, by express terms, on board any American vessel. And, as already said, the purpose and object of the legislation emphasize this construction, and require it wherever, in the waters of the United States, human life is in peril of the sea and equally



require recognition of heroic efforts in its behalf, without reference to locality."

As above stated, the authority conferred upon the Secretary of the Treasury by the acts relating to the award of life-saving medals, which are construed by the act of January 21, 1897, is not in terms restricted to waters over which the United States has jurisdiction by virtue of its power to regulate interstate and foreign commerce. So Attorney General Olney, in an opinion rendered September 26, 1894 (21 Op. 65, 66), construing section 12 of the act of June 18, 1878, said that "the waters contemplated by the section are, in my judgment, either the high seas or what may be described as waters of the United States; that is, *waters belonging to the United States as owner*, or over which it has jurisdiction by virtue of its authority to regulate interstate and foreign commerce."

It follows that, while the acts relating to the award of life-saving medals would not, after the act of January 21, 1897, as they did not theretofore, apply to waters "wholly within a State and no part of the navigable waters of the United States" (21 Op. 65, 66), because such waters are not under the jurisdiction of the United States, they should be construed to apply to the Barac River, in the Philippine Islands, notwithstanding the fact that that river is not a navigable stream, since that river is under the jurisdiction of the United States by virtue of the sovereignty of the United States over the islands. The power of Congress to extend its grant in this respect is unquestionable, and, as stated, the circumstances all indicate an intention so to do.

I have the honor, therefore, to advise you that, the other requirements of the statutes being met, you are authorized to award Capt. Van Schaick the appropriate medal for the service rendered by him as stated.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

PHILIPPINE ISLANDS—ENTRY OF CIGARS FROM.

Section 2804 of the Revised Statutes, which forbids the entry of cigars of less quantity than 3,000 in a single package, applies to cigars coming into the United States from the Philippine Islands.

Cigars and cigarettes brought into the United States from the Philippine Islands are subject to the internal-revenue tax under section 5 of the tariff act of August 5, 1909 (36 Stat. 83), and internal-revenue stamps in payment of such tax are required to be affixed to the packages containing the same.

DEPARTMENT OF JUSTICE,

*May 10, 1911.*

SIR: By your letter of March 22, 1911, you transmitted certain correspondence between the Secretary of War and the Governor General and other officers of the Philippine Islands, in which they request that cigars and cigarettes, the product of those islands, be admitted into the United States in quantities less than 3,000 in a single package. You also state that you have received requests from customs officers for instructions as to the necessity for affixing customs stamps on Philippine cigars.

After quoting sections 2804 and 3402 of the Revised Statutes, you say:

"The admission of Philippine cigars and cigarettes in lots of less than 3,000 in a single package would present no administrative difficulties, and as this department is desirous of facilitating trade with the Philippine Islands so far as may be compatible with the law, I shall be pleased to have an expression of your opinion as to whether or not the provisions of said sections 2804 and 3402 of the Revised Statutes, as quoted above, especially the word 'imported' should be applied to cigars and cigarettes brought to the United States from the said islands."

The admission into the United States of goods coming from the Philippine Islands is regulated primarily by section 5 of the tariff act of August 5, 1909 (36 Stat. 11, 83), which provides:

"SEC. 5. That there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported

from foreign countries: *Provided*, That, except as otherwise hereinafter provided, all articles, the growth or product of or manufactured in the Philippine Islands from materials the growth or product of the Philippine Islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from the Philippine Islands shall hereafter be admitted free of duty, except rice, and except, in any fiscal year \* \* \* cigars in excess of one hundred and fifty million cigars, which quantities shall be ascertained by the Secretary of the Treasury under such rules and regulations as he shall prescribe. \* \* \* *And provided further*, That there shall be levied, collected, and paid in the United States upon articles, goods, wares, or merchandise coming into the United States from the Philippine Islands, a tax equal to the internal-revenue tax imposed in the United States upon the like articles, goods, wares, or merchandise of domestic manufacture; such tax to be paid by internal-revenue stamp or stamps, to be provided by the Commissioner of Internal Revenue, and to be affixed in such manner and under such regulations as he, with the approval of the Secretary of the Treasury, shall prescribe \* \* \*."

Section 2804 of the Revised Statutes, as amended, provides:

"SEC. 2804. No cigars shall be imported unless the same are packed in boxes of not more than five hundred cigars in each box; and no entry of any imported cigars shall be allowed of less quantity than three thousand in a single package; and all cigars on importation shall be placed in public store or bonded warehouse, and shall not be removed therefrom until the same shall have been inspected and a stamp affixed to each box indicating such inspection, and also a serial number to be recorded in the customhouse. And the Secretary of the Treasury is hereby authorized to provide the requisite stamps, and to make all necessary regulations for carrying the above provisions of law into effect."

The act of July 1, 1902 (32 Stat. 691, 711), known as the Philippine organic act, provided:

"SEC. 84. That the laws relating to entry, clearance, and manifests of steamships and other vessels arriving from or going to foreign ports shall apply to voyages each way between the Philippine Islands and the United States and the possessions thereof, *and all laws relating to the collection and protection of customs duties not inconsistent with the act of Congress of March eighth, nineteen hundred and two, 'temporarily to provide revenue for the Philippine Islands,' shall apply in the case of vessels and goods arriving from said Islands in the United States and its aforesaid possessions.*"

This provision is general and continuing in its nature, and has not, so far as I am advised, been repealed by subsequent legislation. Assuming it therefore to be in force, it sufficiently answers your inquiry as to the applicability of section 2804 to cigars coming from the Philippine Islands, and renders unnecessary any consideration of the meaning of the word "imported" in that section. For the same reason, nothing in the opinion of Acting Attorney General Fowler of September 19, 1910 (28 Op. 422), holding that section 14 of the tariff act of August 5, 1909, which prohibits the importation from foreign countries of convict-made goods, did not apply to goods manufactured in the Philippine Islands, is applicable to this case.

Section 2804 of the Revised Statutes plainly relates to the "collection and protection of customs duties" upon cigars, within the meaning of section 84 of the Philippine organic act, and is not inconsistent with the act of March 8, 1902, "temporarily to provide revenue for the Philippine Islands," nor with anything in the tariff act of August 5, 1909. It apparently does not make any difference, so far as the applicability of section 2804 is concerned, that cigars coming into the United States from the Philippine Islands are not dutiable. But such cigars are dutiable unless they are shown to comply with the conditions specified in the act of August 5, 1909, as necessary to entitle them to free entry. All such cigars should, therefore, be entered in accordance with the provisions of the laws relating to the "collection and protection of customs

duties," and particularly section 2804, Revised Statutes, and such, I think, was the intention of Congress.

It is noted that your inquiry pertains both to cigars and cigarettes, while the provisions of law referred to relate in express terms to cigars only. In your letter of the 3d instant you inform me, in response to my inquiry, that the practical construction which your department has placed upon the term "cigars," as used in section 2804 of the Revised Statutes and section 5 of the tariff act of 1909, is that it includes cigarettes, and I adopt that construction herein, as I do not understand that it was your intention to submit that question for my opinion.

Section 3402 of the Revised Statutes, also mentioned in your inquiry, provides:

"SEC. 3402. All cigars imported from foreign countries shall pay, in addition to the import duties imposed thereon, the tax prescribed by law for cigars manufactured in the United States, and shall have the same stamps affixed. The stamps shall be affixed and canceled by the owner or importer of the cigars while they are in the custody of the proper customhouse officers, and the cigars shall not pass out of the custody of such officers until the stamps have been so affixed and canceled, but shall be put up in boxes containing quantities as prescribed in this chapter for cigars manufactured in the United States, before the stamps are affixed. And the owner or importer of such cigars shall be liable to all the penal provisions of this Title prescribed for manufactures of cigars manufactured in the United States \* \* \*"

Section 3402 is a part of the general laws relating to the collection of *internal* revenue. It relates in terms to cigars imported from foreign countries, and, unlike the laws relating to the collection and protection of the *customs* revenue, has apparently not been expressly applied to cigars coming from the Philippine Islands. But it is unnecessary to consider whether this section was intended to apply to cigars coming from the Philippine Islands, because section 5 of the act of August 5, 1909, expressly provides for the internal-revenue tax on cigars brought from the Philippine Islands and specifies that the stamps

in payment thereof are "to be provided by the Commissioner of Internal Revenue, and to be affixed in such manner and under such regulations as he, with the approval of the Secretary of the Treasury, shall prescribe." This specific provision on the subject must be taken as exclusive.

Having held that section 2804, which forbids the entry of cigars of less quantity than 3,000 in a single package, applies to cigars coming from the Philippine Islands, it becomes unnecessary to answer your further question, whether shipments of cigars in quantities of less than 3,000 in a single package through the mails via Hongkong would be a direct or indirect shipment under section 5 of the tariff act of August 5, 1909.

What has been said as to the applicability of section 2804 also disposes of your inquiry in regard to cigars and cigarettes brought into the United States from the Philippine Islands in excess of the limitation fixed by the act of August 5, 1909.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

---

LOWRY NATIONAL BANK OF ATLANTA, GA.—ESTABLISHMENT OF BRANCH OFFICE.

A national bank, independently of section 5190, Revised Statutes, is not under its charter authorized to establish a branch bank or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization.

Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

DEPARTMENT OF JUSTICE,

*May 11, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of January 3, 1911, in which you say that the Lowry National Bank of Atlanta, Ga., desires to establish another office or banking house in that city and has requested the Comptroller of the Currency to state whether any objection will be made to such action, and you ask

my opinion with reference to the right of a national bank to establish an additional or branch office or banking house in the place designated in its certificate of organization.

I have given the question consideration commensurate with its great importance and with the earnestness and ability with which it has been presented in briefs and arguments submitted on behalf of the bank, and will assign at some length the reasons for the conclusions which I have reached.

Whatever may be the English rule with reference to the power of the *stockholders* of a corporation to make a contract which will bind the corporation, when the power to make such contract is not prohibited, although not granted either expressly or by implication in its charter (*Riche v. The Ashbury Railway, etc., Co.*, Law Rep. 9 Ex. Cas. 224, 227), the American rule defining the powers that may be exercised by a corporation is well settled, and was thus stated by the Supreme Court of the United States in *Green Bay & Minn. Railroad Co. v. Union Steamboat Co.* 107 U. S. 98, 100:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The principle is also well stated in *People v. Pullman's Palace Car Co.* 175 Ill. 125, 136, as follows:

"The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted—that is, to accomplish the purpose of its existence—and can in no case avail to enlarge the express powers, and thereby war-

rant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary—that is, needful, suitable and proper to accomplish the object of the grant, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation.”

Although it has been said that—

“A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends” (*Barry v. Merchants' Exchange Co.* 1 Sandf. Ch. (N. Y.) 280, 289);

yet manifestly a corporation organized to engage in a certain business can not do everything that can be done by a natural person engaged in a like business. The rights and powers of a natural person to enter into all kinds of contracts and to transact all character of business are inherent; and any limitations upon that power must be found in some law restricting such rights; and hence acts may be performed by a natural person which only remotely or indirectly affect a business in which he is engaged, and are not necessary, needful, or immediately appropriate to the transaction of the business, and which, if done by a corporation engaged in such business, would be *ultra vires*.

The fundamental principle here stated has been applied by some courts and textbook writers in connection with the establishment by banks of agencies for the transaction of a particular business, and also branches for the transaction of a general banking business; and it is well to review these authorities before applying the principle to national banks.

The leading case with reference to the power of a bank to transact a particular kind of business through an agency is *Bank of Augusta v. Earle*, 13 Pet. 519. The bank of Augusta was incorporated by a special act of the Legisla-



ture of Georgia, and the corporation was given the general power to deal in bills of exchange. The principal office of the corporation was located in Augusta, Ga., but an agency was maintained in Mobile, Ala., for the purpose of trafficking in exchange. In the due course of business a bill of exchange drawn by a firm in Mobile on a firm in New York City in favor of the defendant Earle, accepted by the drawee and indorsed by the payee, was discounted by the Mobile agency with funds placed there for that purpose. The bill was protested for nonpayment and returned to the Bank of Augusta, whereupon suit was brought against Earle. The circuit court dismissed the suit upon the ground that the Bank of Augusta was without authority to make a contract in the State of Alabama. On appeal this judgment was reversed by the Supreme Court, the main question there discussed and determined being, whether a corporation had the power to make a contract outside of the State which had granted its charter. Upon this question the court said:

“The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another State. The power thus given, clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another State; and the general power to purchase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that State could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction” (p. 588).

And again:

"The corporation must, no doubt, show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient, that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed" (p. 589).

In *Tombigbee Railroad Co. v. Kneeland*, 4 How. 16, a Mississippi corporation vested with banking powers brought an action on a promissory note discounted at the branch office of plaintiff in Gainesville, Ala. The act of the legislature incorporating this company provided that it could establish branches when the directors deemed it expedient, at such places as might be designated by the legislature. It does not appear, however, whether Gainesville had been designated as such place; but the case was made to turn entirely upon the authority of *Bank of Augusta v. Earle*, it being held that the transaction in question was authorized by the company's charter, and was valid, though the transaction was had in the State of Alabama.

*City Bank of Columbus v. Beach*, Fed. Case No. 2736, was an action brought to recover the amount of two bills of exchange discounted at an agency maintained in Cleveland, Ohio, by the City Bank of Columbus. The bank was incorporated under the laws of Ohio, and was vested with express power to buy, sell, and discount bills of exchange, and it maintained the agency at Cleveland for the purpose of dealing in bills of exchange. In passing upon the legality of such agency, Circuit Judge Nelson said:

"The acts under which the bank became a corporation, conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the city of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not

in contravention of the charter of the bank, or of any law of the State of Ohio. I think this case falls within the principle of the case of *Bank of Augusta v. Earle*, 13 Pet. (38 U. S.) 519, and of *Tombigbee R. Co. v. Kneeland*, 4 How. (45 U. S.) 16, and that a new trial ought not be granted."

And District Judge Conkling thus stated the question presented:

"The question, then, is resolved into the simple inquiry whether a State bank, having power by its charter to deal in bills of exchange, without any express restriction as to place, can lawfully establish an agency, for the purpose of buying and selling bills of exchange, in a part of the State other than that of its location;"

and the question was answered by the learned judge in the affirmative.

Many cases might also be cited wherein it has been held that banking corporations have the power to establish clearing-house agencies.

These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business. But are they authority for the proposition that a bank may establish a branch for the transaction of a general banking business?

In none of the cases cited has it been suggested that the principle declared can be extended to include such a power. On the other hand, the case of *People v. Oakland County Bank*, 1 Douglass, 282, 288, decided by the Supreme Court of Michigan, is clearly to the contrary. The Oakland County Bank was organized under a special act of the legislature, and the only reference therein to its place of business was that the parties mentioned might receive subscriptions to the capital stock of a bank to be located at such place *in the county of Oakland* as the majority of the stockholders might direct; and again, upon the paying in of \$20,000 of the capital stock of the bank, the commissioners or directors should procure a convenient place *in said county of Oakland* and commence operations. There was no *prohi-*

*bition* in the act against the bank doing business anywhere in the State, or against its establishing a branch. However, the bank did establish a branch in Detroit, in which was carried on a regular banking business, and the action was brought to revoke the charter of the bank because of the maintenance of this branch. The court held that the corporation was wholly without authority to establish the branch, saying:

“By the act of incorporation, the stockholders were authorized to locate the bank in the county of Oakland. It follows, therefore, that, if the corporation has undertaken to exercise any of its franchises without that county, it has usurped an authority in violation of law, and must suffer the penalty which that law inflicts.”

In *Bank of Augusta v. Earle* it was held that, though the Legislature of the State of Georgia did not undertake to authorize the corporation to do a banking business outside of that State, yet the bank could transact a *particular business* in the State of Alabama through an agency; while in the *Oakland County Bank* case it was held that under a like limitation in its charter powers the establishment of a branch wherein a general banking business was carried on was unauthorized and unlawful.

If in the former case a branch bank had been established in Mobile for the purpose of conducting a general banking business instead of a mere agency for the purchase of bills of exchange, there is nothing in the opinion of the supreme court to indicate that, in a direct attack upon such institution, it would have been held as authorized by the bank's charter; while in the latter case, if a mere agency for the purchase of bills of exchange had been established in Detroit, the Supreme Court of Michigan would, in all probability, have sustained the validity of its transactions.

These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist in fact is obvious.

An agency requires no division of the capital stock, and the details of the business are few and are easily supervised

by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.

That the authorities sustaining the validity of transactions by an agency do not apply to the establishment of a branch bank is further shown by the following authorities, wherein it is expressly declared that a bank can not establish a branch unless the power to do so is granted by its charter or the general laws relating to the subject in express language or by necessary implication.

In Morse on Banks and Banking, section 46, it is said:

“Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases, it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal, for such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home State or in other States.”

In 1 Morawetz on Corporations, section 387, it is said:

“Banking corporations have implied authority to create agencies for special purposes, such as the redemption and purchase of bills of exchange and other securities, wherever this may be advantageous in carrying on their business; but they have no right to establish branch banks in the absence of express authority conferred by charter. When a banking corporation is created to do business at some particular place, it is implied that its banking house shall be established at that place only, and that its affairs shall be managed by a single set of officers, in the usual manner.”

Magee on Banks and Banking, section 30, says:

“The question of privilege in the establishment of a branch bank seems to be settled that a national bank has

no right to establish branch banks without special legislative authority. The ruling is upon the principle, no doubt, that the bank must have a location or place where all its business is to be transacted, and branches, especially if established outside of the city or town, and at a place other than the location of the mother bank, would lead to conflict as to where notes should be protested, and payments be made."

In Zane on Banks and Banking, section 24, it is said:

"If private banking is permitted, there is no reason, in the absence of legal prohibition, why a private bank should not have branches; but a corporation has only the powers granted it, and it can not establish branches unless the power to do so is granted to it."

In *Morehead Banking Co. v. Tate*, 122 N. C. 313, 316, the charter of the bank provided that "its principal place of business shall be at Durham, North Carolina," but did not, in express terms, permit the establishment of branch banks. However, the bank established a branch at Burlington, N. C., and the cashier at this branch executed a bond for the faithful performance of his duties, and the action was brought to recover for a breach of the bond. The court held that the defendant was not in a position to question the right of the bank to locate a branch at Burlington; but, in response to the contention that the expression in the charter that the "*principal* place of business shall be at Durham" by implication authorized the establishment of a branch bank or agency at another point, the court said:

"This court would not be willing to sanction this practice of establishing branch banks or agencies to do a banking business unless they are *expressly* (italics the court's) authorized by legislative authority contained in the charter. And any bank without having this express grant, undertaking to establish such branch establishments, will lay itself liable to have its charter vacated."

In *Bruner v. Citizens Bank of Shelbyville*, 134 Ky. 283, 298, the power of a bank to establish a branch when not expressly authorized to do so by its charter was very fully and ably considered, and after enumerating many reasons why such authority should not be implied, unless such

implication necessarily arose from the language used, the court concluded its opinion as follows:

“Other reasons might be advanced against granting the powers contended for, but we consider these sufficient to support the conclusion we have reached that, in the absence of express legislative authority, the power to establish branch banks does not follow by implication as a reasonable or necessary incident to the right to do a banking business. This construction does not mean that banks may not have agents. There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it. We believe that safe and conservative banking methods, the protection of the public, the security of depositors, and the interests of the stockholders all demand that banks shall have only one place at which ‘to carry on the business of banking and discounting and negotiating notes, drafts, bills of exchange, and other evidences of debt, and purchasing bonds, receiving deposits, and allowing interest thereon, buying and selling exchange, coin, and bullion, and lending money on personal or real security.’ And that to legalize by judicial construction a departure from this course would soon result in failure that would do infinite harm to the banking interest of the State and bring disaster to numbers of innocent people.”

My attention has been called to no case or textbook wherein the principle has been stated with approval that a bank has the power to establish a branch for the carrying on of a general banking business, unless such power is granted either in its charter or by general statute in express language or by necessary implication; and, in view of the authorities above cited, it should be considered as settled that no such power otherwise exists.

With this principle in mind, let us examine the laws pertaining to the establishment and control of national

banks, and determine whether any such power is therein granted, either expressly or by implication.

The general powers granted to national banks are contained in section 5136, Revised Statutes, paragraphs 6 and 7. In paragraph 6 the association is given power to prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business shall be conducted, and the privileges granted to it by law exercised and enjoyed; and by paragraph 7 it is empowered—

“To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; *by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this Title.*”

Clearly, neither of these provisions contain an express or *necessarily* implied power to establish a branch bank. The former relates to the adoption of by-laws by the board of directors prescribing the manner of conducting the business of the institution, while the latter confers the power to carry on the business of banking by the exercise of the particular powers enumerated therein. While these powers are designated as incidental, yet undoubtedly all powers are also granted which are reasonably necessary for the exercise of each and every one of these enumerated powers.

As said in *First National Bank v. National Exchange Bank*, 92 U. S. 122, 127, in referring to section 5136, Revised Statutes:

“Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.”

Yet the power to establish a branch bank is certainly in no respect essential to the discounting and negotiating of



promissory notes, drafts, bills of exchange, and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.

The only clauses which relate to the place where a bank may transact business are, first, in section 5134, Revised Statutes, where it is provided that the certificate of organization shall specify—

“Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county or city, town, or village.”

And, second, section 5190, Revised Statutes, which provides that—

“The usual business of each national banking association shall be transacted at an office or banking-house, located in the place specified in its organization certificate.”

The first of these provisions does not expressly prohibit the carrying on of a general banking business outside of the place designated in the certificate; yet it is agreed that the clear implication therein is that the power of the bank to carry on such a business can not be exercised elsewhere than in such place; and there is certainly no implication or intimation in this clause that the association may establish an unlimited number of banks or branches within the designated place.

The arguments presented on behalf of the bank have been directed mainly to section 5190, but it has not been even suggested that there is anything in the language of this section which of itself can possibly be construed as an implication that a national bank has the power to establish a branch bank. The sole contention is that this section does not *expressly prohibit* the establishment of a branch.

It may be admitted that there is reasonable ground for this contention, and that if there were any provision elsewhere in the national banking laws which clearly implied that such authority existed, by a subtle process of reasoning this section could be construed to be consistent therewith. But in the absence of such language elsewhere in the act, and in view of the general principle that banks can not establish branches unless the power to do so is granted, it appears to

me that the natural meaning of this section is that the general banking business of a national bank must be conducted in *one* office or banking house, within the place designated in its organization certificate.

But little light is thrown upon the meaning of this section by the decisions of the courts. In *Merchants' Bank v. State Bank*, 10 Wall. 604, 650, it was insisted that the certification of checks by a cashier at another place than his banking house was, under this section, void; but the court held to the contrary, saying:

"It is objected that the checks were not certified by the cashier at his banking-house. The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondence or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection."

This decision is but in line with *Bank of Augusta v. Earle* and other cases in which it was held that a bank may transact a particular class of business outside its banking house.

In *Armstrong v. Second National Bank of Springfield*, 38 Fed. 883, 886, one question was whether or not a national bank could enter into a general arrangement with a bank at another point to cash its checks, and Judge Sage upon this point said:

"If, now, we turn to section 5190, of the United States Revised Statutes, we find it enacted that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.' Under this section it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house."

There is some doubt whether this holding of the learned judge is in accord with the cases above cited which uphold the power of a bank to maintain an agency.

In neither of these cases was the bearing of this section upon the power to establish branch banks before the court or given any consideration. Hence, so far as the courts are concerned, the precise meaning of this section is an open one; but I think the construction above given the most natural and reasonable.

Section 5138, Revised Statutes, also has an important bearing upon this question. There it is provided that the minimum capital stock of a bank in a place containing from 3,000 to 6,000 inhabitants shall be not less than \$50,000; in a place from 6,000 to 50,000 inhabitants, not less than \$100,000; and in all larger places the capital shall be not less than \$200,000.

In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; exchange, coin, and bullion are bought and sold; money is loaned, and every kind of banking business that is authorized is there transacted, unless it be the issuing and circulating of bank notes. In proportion to the amount of business transacted, the same capital is required to run the branch bank as to operate the parent bank. In the city of Atlanta no national bank can be organized for a less capital than \$200,000; and if a national bank in that city, having a capital stock of \$200,000, should establish a branch bank therein, the practical result would be that two banks would be in operation on a capital upon which only one bank is authorized to do business in that city; and each additional branch would, of course, constitute a further division of the capital in violation of the spirit of this section of the statute.

Furthermore, I have carefully examined the national banking laws, and I fail to find any provision which empowers the comptroller to restrain or to regulate in any manner the conduct of a national bank with reference to the establishment and maintenance of branch banks. He is authorized and directed to approve of the name assumed by the association (sec. 5134, Rev. Stat., par. 1); when notified that 50 per cent of the capital stock has been paid in, and the laws have otherwise been complied with, he is required to examine into the condition of the association, the name and place of residence of its directors, the amount

of capital stock of which each is the owner in good faith, and whether such association has complied with all the provisions of the act, and shall cause a proper statement to be attested by oath of a majority of its directors and the president and cashier; and, if after such examination it appears that the association is lawfully entitled to commence the business of banking, it is his duty to issue a proper certificate to that effect (secs. 5168 and 5169, Rev. Stats.); he is required to approve the increase of capital stock (act of May 1, 1886 sec. 1; sec. 5142, Rev. Stat.), and also the decrease of the capital stock (sec. 5143, Rev. Stat.); he can, at his discretion, extend the corporate existence of the association (act of July 12, 1882, sec. 9; 22 Stat. 162); he must approve reserve agents of the association (secs. 5192 and 5195, Rev. Stat.); he is required to give notice to an association that is short in reserve funds (sec. 5192, Rev. Stat.); he must approve the change of name and location of a bank (act of May 1, 1886, sec. 2; 24 Stat. 18), and shall also approve of the conversion of State banks into national banks (sec. 5154, Rev. Stat.); but there is no provision directing or authorizing him to exercise any power whatever with reference to the location of a branch bank or the terms and conditions upon which such a branch may be established and maintained.

Can it be supposed that if Congress intended to authorize the establishment of branches by national banks no restraint whatever would have been thrown around the exercise of such power, and that the comptroller, who in all other respects is given such ample power of control over the existence and conduct of banks, would not have been vested with some power or control over the location of such branches and the manner in which the same should be established and conducted?

If, under the laws as they now exist, a national bank has the power to establish a branch, the exercise of that power is entirely within the discretion of the board of directors of the association, and it may be exercised without any restraint whatever; and the Lowry National Bank can

establish not only one branch in the city of Atlanta, but any number of branches, without consultation with the comptroller with reference thereto. Such an unrestrained power, it appears to me, would be fraught with the most serious danger and would result in an inflation of banking business upon insufficient capital, and in an inadequate means of supervision and control over a bank's business by the chief officials in authority, which, in all probability, would bring disaster to the welfare and reputation of the national banking system.

It is quite probable that some national banks, under peculiar circumstances, should be permitted to establish branches, but this should not be done except under the supervision and direction of the comptroller, who should possess the authority to make careful investigation of all the conditions and exercise his judgment as to whether the establishment of such branch should be permitted and to prescribe proper regulations by which it should be conducted.

It is needless to say that such a power can be granted only by Congress, and can not be vested in the comptroller by a mere construction of the statute, when the statute contains no clause which will warrant such a construction.

Finally, the construction heretofore placed upon the banking laws, both by Congress and your department has been uniformly in accordance with the view that a national bank has not the power to establish a branch bank.

By section 7 of the act of March 3, 1865, chapter 78 (13 Stat. 484; sec. 5155, Revised Statutes), it is provided that—

“It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.”

If the power existed for national banks to have branches, there was no necessity for this express provision allowing State banks, when converted, to retain their branches; and, moreover, the limitation of this power to such banks as had their capital assigned to the mother and branch banks in definite proportions, clearly shows that it was not supposed that such a power was possessed by banks in general.

By act of May 12, 1892 (27 Stat. 33), any national bank in Chicago designated by the World's Columbian Exposition was, upon approval by the comptroller, authorized to conduct a banking office upon the exposition grounds, the time within which such branch might be operated being restricted to two years; and a similar act was passed March 3, 1901 (31 Stat. 1444), with reference to the establishment by the banks of St. Louis of branches on the grounds of the Louisiana Purchase Exposition.

Of course the interpretation of statutes is a judicial function, and the courts may disregard the meaning ascribed to an act in subsequent legislation. But the construction of an act by Congress, especially by the Congress which enacted it, is always given much consideration; the general rule being thus stated in *United States v. Freeman*, 3 How. 556, 565:

"If it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute."

The officers of your department who have administered the banking laws have also given a like construction to this section. I have been unable to find any expression made by them with reference to this feature of the banking laws previous to August 10, 1889. On that date Solicitor Hepburn held, in an opinion rendered at the request of the comptroller, that under section 5190, Revised Statutes, a banking association had to transact its usual business in *one* office or banking house. That this construction has been uniformly followed and concurred in is shown by the "Instructions and suggestions of the Comptroller of

the Currency relating to the organization, etc., of national banks," issued in 1909, wherein it is said:

"The word 'place' and 'at an office or banking house' (as used in section 5190) have always been construed by the comptroller to mean the legal domicile of the corporation, of which it can have but one" (p. 40).

And, again:

"While the national-bank act does not, in express terms, prohibit the establishment and maintenance of branch banks or agencies by associations or primary organization, the implication to that effect is clear, and the courts have held that what is implied is as effective as that which is expressed" (p. 42).

On November 15, 1910, this question was submitted to the present solicitor of your department, who, after mature and careful consideration, concurred in the opinion of Solicitor Hepburn.

With this uniform construction of this statute by your department for more than 20 years, and the unmistakable inference that the Congress which passed the act entertained the same view as to its meaning, I would hesitate to express a contrary opinion if, as an original proposition, I believed the act capable of being so construed, even though the contrary construction were the more reasonable.

However, upon the various considerations above stated, it is my opinion that:

First. Independently of section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and,

Second. That section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

Respectfully,

J. A. FOWLER,

*Assistant to the Attorney General.*

Approved:

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

NATURALIZATION—ATTORNEY-GENERAL'S OPINION.

The Attorney-General declines to give an official opinion upon the question whether an objection made to the naturalization of an alien should have been sustained, as no case involving that question is now pending before the Department requesting it, and for the further reason that the question is a judicial one.

The Attorney-General also declines to answer the question whether an appeal would lie from the judgment of a naturalizing court to one of the higher courts of North Dakota, for same reasons and for the additional reason that the question relates merely to a hypothetical case.

DEPARTMENT OF JUSTICE,

*May 12, 1911.*

SIR: I beg to acknowledge the receipt of your letter of the 4th instant, in reference to the case of Iver Iversen Lysne. Lysne, it appears from the record in his case, was admitted to citizenship by the district court of Benson County, N. Dak., in August, 1910, over the objection of the Government, notwithstanding it was shown that he had been convicted in a court of the State of keeping a place for gambling, and sentenced to confinement in the county jail for a period of 30 days and to pay a fine and costs; that he had not appealed from said judgment, and that the same had been enforced. In the naturalization proceedings, however, Lysne denied that he was guilty of the charge referred to, and declared that it was his intention to comply with the law and principles of the Constitution of the United States.

No appeal was taken in behalf of the United States from the judgment of the State court admitting Lysne to citizenship, and the department has been advised that the time for taking such an appeal has expired, assuming that one would lie. Nevertheless, you state that you wish, if possible, to secure my opinion upon the following questions:

"First. Do you think the objection made to the naturalization of this alien is a good one and should have been sustained, the objection being that he had been tried by a jury and found guilty of violating the law of the State of North Dakota, and was therefore not shown to be a man of good moral character, attached to the principles of the Constitu-



tion of the United States, and well disposed to the good order and happiness of the same as required by the fourth paragraph of section four of the act of June 29, 1906?

"Second. This objection having been overruled, if proper exception had been taken and all necessary and proper steps to take an appeal had been taken in time, would an appeal lie to one of the higher courts of the State of North Dakota?"

In reply to the first question, I beg to call your attention to the department's letter to you of March 16 last, relating to the propriety of instituting proceedings for the cancellation of the certificate of naturalization issued to Lysne, in which it was said:

"This department concurs in the view of the district attorney that under the circumstances stated the certificate of naturalization was not illegally procured within the meaning of section 15 of the act of June 29, 1906, authorizing cancellation proceedings. The question of character in naturalization proceedings is one of fact, to be determined by the court. The statute expressly provides that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that he has, during the five years immediately preceding the date of his application, behaved as a man of good moral character. It does not undertake to prescribe any rules of evidence for the court to follow in reaching its conclusion.

"In the present case it appears that the court heard and duly considered all the facts respecting the applicant's character. To be sure there may be good reasons to take the view that the court's conclusion was not warranted by the facts, but the essential thing is that it did appear to the satisfaction of the court that the applicant was qualified. Such being the case, if the proceedings were regular in all other respects, it is manifest that the requirements of the naturalization law have been complied with, and there is no ground for cancellation proceedings."

As indicated in this letter, the question as to the sufficiency of the evidence to establish Lysne's character is a judicial one, upon which, especially since it has been de-

cided by the court, it would be improper for the Attorney General to express an opinion. As said by Acting Attorney General Aldrich (20 Op. 383), in declining to render an opinion upon a certain question and referring to the provision of section 356 of the Revised Statutes that "the head of any executive department may require the opinion of the Attorney General on any question of law arising in the administration of his department"—

"Furthermore, the questions propounded are judicial in character, and must be decided by the courts, if decided at all, and therefore an expression of opinion on them by me would have no more weight than the opinions of any unofficial person (19 Op. 56; 13 Op. 160). But the law intended that the opinions of the Attorney General should have *authority*, and this object can only be accomplished by confining them to questions strictly appertaining to executive administration."

It is also to be observed that the case to which your inquiry relates is not one pending in your department and requires no official action on your part. For that reason, if for no other, the Attorney General would be compelled, in deference to a well-established practice of this department, to decline to pass upon the question referred to. (20 Op. 536; 21 ib. 109, 509, 568.)

For like reasons, it would be improper for me to attempt to answer your second question—whether an appeal would lie from the judgment of the naturalizing court to one of the higher courts of the State of North Dakota. Furthermore, the time to appeal in Lysne's case having expired, it is manifest that this question relates merely to a hypothetical case, and upon such cases the Attorney General has uniformly declined to express an opinion. (20 Op. 288; 22 ib. 77; 25 ib. 93.)

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.

102 *Legality of Bond Issue for Municipality of Cebu, P.I.*

LEGALITY OF BOND ISSUE FOR THE MUNICIPALITY OF  
CEBU, PHILIPPINE ISLANDS.

The issuance of bonds in the sum of \$125,000 for the purpose of providing funds for certain municipal improvements in the municipality of Cebu, P. I., when made in accordance with the provisions of the act of the Philippine Legislature, approved March 29, 1911, as herein construed, is valid.

DEPARTMENT OF JUSTICE,

*May 25, 1911.*

SIR: I beg to respond to your letter of the 18th instant, in which you inclose a copy of your communication of the 19th ultimo requesting my opinion as to the legality of bonds in the sum of \$125,000 to be issued by you on behalf of the municipality of Cebu, Philippine Islands, under authority of an act of the Philippine Legislature, for the purpose of providing funds for certain municipal improvements. It does not appear from the files that the original of your letter of April 19, above mentioned, was ever received at this department.

Section 66 of the Philippine civil government act of July 1, 1902 (32 Stat. 691, 707), as amended by the act of February 6, 1905 (33 Stat. 689, 690), is as follows:

"SEC. 66. That for the purpose of providing funds to construct necessary sewer and drainage facilities, to secure a sufficient supply of water and necessary buildings for primary public schools in municipalities, the Government of the Philippine Islands may, where current taxation is inadequate for the purpose, under such limitations, terms, and conditions as it may prescribe, authorize, by appropriate legislation, to be approved by the President of the United States, any municipality of said islands to incur indebtedness, borrow money, and to issue and sell (at not less than par value in gold coin of the United States) registered or coupon bonds, in such amount and payable at such time as may be determined to be necessary by the Government of said islands, with interest thereon not to exceed five per centum per annum: *Provided*, That the entire indebtedness of any municipality shall not exceed five per centum of the assessed valuation of the real estate in said municipality, and any obligation in excess of such limit shall be null and void."

Sections 67, 68, and 69 of the civil government act above mentioned (32 Stat. 707, 708) read as follows:

"SEC. 67. That all municipal bonds shall be in denominations of fifty dollars, or any multiple thereof, bearing interest at a rate not exceeding five per centum per annum, payable quarterly, such bonds to be payable at the pleasure of the Government of the Philippine Islands, after dates named in said bonds not less than five nor more than thirty years from the date of their issue, together with the interest thereon, in gold coin of the United States of the present standard value, or its equivalent in value in money of the said islands; and said bonds shall be exempt from the payment of all taxes or duties of the Government of the Philippine Islands, or any local authority therein, or the Government of the United States.

"SEC. 68. That all moneys which may be realized or received from the issue and sale of said bonds shall be utilized under authorization of the Government of the Philippine Islands in providing the municipal improvements and betterments which induced the issue and sale of said bonds, and for no other purpose.

"SEC. 69. That the Government of the Philippine Islands shall, by the levy and collection of taxes on the municipality, its inhabitants and their property, or by other means, make adequate provision to meet the obligation of the bonds of such municipality, and shall create a sinking fund sufficient to retire them and pay the interest thereon in accordance with the terms of issue: *Provided*, That if said bonds or any portion thereof shall be paid out of the funds of the Government of said islands, such municipality shall reimburse said Government for the sum thus paid, and said Government is hereby empowered to collect said sum by the levy and collection of taxes on such municipality."

The above-mentioned act of February 6, 1905, also provides (33 Stat. 689):

"That all bonds issued by the Government of the Philippine Islands, or by its authority, shall be exempt from taxation by the Government of the United States, or by the Government of the Philippine Islands or of any political

or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia."

An act of the Philippine Legislature inclosed by you, enacted December 27, 1910, and approved, as you state, by the President on March 29, 1911, pursuant to the requirements of section 66, above quoted, authorizes "the municipality of Cebu, Province of Cebu," "to incur an indebtedness of one hundred and twenty-five thousand dollars in gold coin of the United States," authorizes the Secretary of War to issue "in the name and on behalf of the municipality of Cebu, Province of Cebu, its bonds covering the said indebtedness for the purpose of providing funds to construct necessary sewer and drainage facilities, to secure a sufficient supply of water, and necessary buildings for primary public schools in said municipality of Cebu," and provides:

"The bonds thus authorized shall be issued and dated January first, nineteen hundred and eleven, shall bear interest at the rate of four per centum per annum, payable quarterly in gold coin, and shall be redeemable at the pleasure of the municipality of Cebu after ten years from date of issue, and payable thirty years after date of issue in said gold coin. Both principal and interest shall be payable at the Treasury of the United States. The said bonds shall be in registered form, in denominations of one thousand to ten thousand dollars, in proportions to suit the purchasers thereof, and shall be registered and transferable at the office of the Treasury Department of the United States at Washington, District of Columbia. The said bonds are declared, by section one of said act of Congress approved February sixth, nineteen hundred and five, to be exempt from the payment of all taxation by the Government of the United States, or by the Government of the Philippine Islands, or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of

Columbia, pursuant to which act, as well as to said act of Congress approved July first, nineteen hundred and two, and to this act these bonds are issued; which facts shall be stated upon their face."

The Secretary of War is further authorized by this act (sec. 2) to sell these bonds on terms most favorable to the municipality, and to deposit the proceeds of such sale or sales with an authorized depository of the Government of the Philippine Islands, provided, "that no bond or bonds shall be sold at less than par or face value." The act provides (sec. 3) that the amount of bonds so issued and sold, the amount realized from the sale or sales, the numbers and denominations of the bonds sold, the date of such deposit of the proceeds and the name of the depository shall be made a matter of record by the auditor and treasurer of the Philippine Islands, upon report being made to them by the Secretary of War, and "immediately thereafter shall be reported by said auditor to the municipal council of the municipality of Cebu." The proceeds of the sale is directed (sec. 4) to be placed by the treasurer of the Philippines to the credit of the "public-works bond issue of the municipality of Cebu," and "shall only be withdrawn therefrom by appropriation by the municipal council of Cebu, approved by the Governor General of the Philippine Islands, for the purposes mentioned in the act." Commencing with the fiscal year ending June 30, 1911, and each succeeding year thereafter, until the bonds shall have been paid (sec. 5), the act makes a continuing annual appropriation out of the funds of the insular treasury, "of such sum as may be necessary to meet the annual interest payments upon the bonds." Commencing with the fiscal year ending June 30, 1913, and each succeeding year thereafter until the bonds shall have been paid, the act (sec. 6) makes a continuing annual appropriation from the funds of the insular treasury of \$1,937, "money of the United States," for each \$100,000, "and proportionally for each fraction thereof, of bonds issued in accordance with this act," the sum so appropriated and the interest thereon to be "invested by the insular treasurer in such

manner as may be approved by the Governor General," and to "constitute a sinking fund for the payment of said bonds," the funds so appropriated (sec. 7) to be reimbursed by the municipality of Cebu from its current revenues "within ninety days after the same shall have been so paid as interest or placed in said sinking fund." In case of failure to make such reimbursement, the provincial treasurer of the Province of Cebu is authorized and directed (sec. 7) to withhold from the revenues of the municipality that may come into his possession an amount sufficient to make any reimbursement provided for and to deposit the same with the treasurer of the islands for that purpose.

It is apparent that, in accordance with the above-quoted provisions of section 66 of the Philippine civil government act, as that section is amended, this act of the Philippine Legislature authorizes the issuance of these bonds to provide funds for the municipal purposes therein specified, and I assume that current taxation is inadequate for that purpose, as provided in said section.

The provision of the act of the Philippine Legislature (sec. 2) "that no bond or bonds shall be sold at less than par or face value," should be construed in connection with and as limited by the provision of section 66 that such bonds are to be issued and sold "at not less than par value in gold coin of the United States," and especially so in view of the provision in section 1 of the act of the Philippine Legislature that the bonds are issued pursuant to the Act of July 1, 1902, of which section 66 is a part, which fact is directed to be stated upon their face. So, construing the two provisions together, the bonds should be issued and sold at not less than their par value in gold coin of the United States.

As to the proviso in section 66 "that the entire indebtedness of any municipality shall not exceed five per centum of the assessed valuation of the real estate in said municipality," you state in your letter that—

"The city of Cebu has no bonded indebtedness, and the assessed valuation of its real estate is more than \$3,500,000,

so that the bond issue provided for is well within the prescribed limitation."

Considering the other statutory requirements, the interest on the bonds, in accordance with sections 66 and 67, does not "exceed five per centum per annum," and is payable quarterly. In accordance with section 67, the bonds are to be in denominations which are multiples of \$50 and are to be payable at the pleasure of the Philippine Government after dates therein named, which are within the periods prescribed by that section.

Evidently the provision of the act of the Philippine Legislature that the bonds and interest thereon shall be payable "in gold coin," was intended to comply with the direction of section 67 that such bonds and interest are to be payable "in gold coin of the United States of the present standard value, or its equivalent in value in money of the said islands." Analogously with what has been said as to the provision for sale at par or face value, the act of the legislature is properly to be considered as limited and governed by the provision of section 67 as to the meaning of the words "in gold coin."

The act of the legislature provides, as directed by section 68, that all moneys realized from the issue and sale of the bonds shall be utilized for the purpose mentioned in the act. As directed by section 69, the act of the legislature makes adequate provision to meet the obligation of the bonds and creates a sinking fund sufficient to retire them. The bonds are to be exempt from taxation, as provided by the clause quoted above from the act of February 6, 1905, which fact is to be stated upon their face.

I beg to advise you, therefore, that in my opinion the bonds, when issued in accordance with the provisions of the act of the Philippine Legislature as herein construed, will be valid and binding obligations.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.



## MANUFACTURE AND IMPORTATION OF SMOKING OPIUM.

The act of February 9, 1909 (35 Stat. 614), prohibiting the importation of opium for other than medicinal purposes, did not repeal that portion of the act of October 1, 1890 (26 Stat. 620, 621), which relates to the manufacture of smoking opium in the United States.

Neither the act of February 9, 1909, nor any other act has abrogated or dispensed with the necessity of observing each and all of the requirements of section 37 of the act of October 1, 1890, as to notices, inventories, bonds, books, returns, etc.

It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if by any permissible construction both may stand and be enforced there is no such repeal.

## DEPARTMENT OF JUSTICE,

*May 29, 1911.*

SIR: I have the honor to reply to the note of the Assistant Secretary of the Treasury, of date April 18, 1911, transmitted by your direction, in which my opinion is requested, whether the act of February 9, 1909 (35 Stat. 614), has repealed that portion of the act of October 1, 1890 (26 Stat. 620, 621), which relates to the manufacture or preparation of opium for smoking.

The pertinent portion of the earlier act is as follows:

"SEC. 36. That an internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue.

"SEC. 37. That every manufacturer of such opium shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenues and in a penal sum of not less than five thousand dollars; and the sum of

said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue.

"SEC. 38. That all prepared smoking opium imported into the United States shall, before removal from the custom-house, be duly stamped in such manner as to denote that the duty thereon has been paid; and that all opium manufactured in the United States for smoking purposes, before being removed from the place of manufacture, whether for consumption or storage, shall be duly stamped in such permanent manner as to denote the payment of the internal-revenue tax thereon.

"SEC. 39. That the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, cancellation, and destruction of stamps relating to tobacco and snuff, as far as applicable are hereby made to apply to stamps provided for by the preceding section.

"SEC. 40. That a penalty of not more than one thousand dollars, or imprisonment not more than one year, or both, in the discretion of the court shall be imposed for each and every violation of the preceding sections of this act relating to opium by any person or persons; and all prepared smoking opium wherever found within the United States without stamps required by this act shall be forfeited."

The later act provides:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"SEC. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any

manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if by any permissible construction both may stand and be enforced there is no such repeal.

It will be noticed that with the exception of a portion of a single sentence the first of these acts relates exclusively to the manufacture or preparation within this country of opium for smoking purposes. The single exception to this is the provision that "all prepared smoking opium imported into the United States shall, before removal from the customhouse, be duly stamped in such manner as to denote that the duty thereon has been paid." This portion of the earlier act is in great part an internal-revenue measure and, as already said, relates exclusively to the manufacture or preparation of smoking opium in this country and may be enforced in all its aspects independently of and notwithstanding any law either forbidding or regulating the importation of such opium. It relates to and regulates only the domestic preparation of the drug and is not affected by any act forbidding or regulating the importation of the same article. The two acts are quite independent of each other and relate to different subjects and the former may well continue to regulate the domestic preparation while the latter forbids the importation of the same drug. The former is not solely an internal-revenue measure, but is also a regulation of the preparation for use of a deleterious

article, and if the later act should entirely prevent the importation of opium yet the same reasons both as a revenue measure and a regulation which operated to produce the earlier act would still exist, for there was still opium here which might be prepared for smoking. But if the later act did not entirely prevent such importation then there is further reason for such a law as that contained in the earlier act.

While with the single unimportant exception above mentioned the earlier act relates exclusively to domestic preparation, the later act relates exclusively to the importation of opium and, subjected to the accepted test above mentioned, no reason is perceived why both these acts may not well stand and be enforced.

An act which taxes or regulates the domestic manufacture or preparation of an article may well be entirely consistent with another and later act which absolutely prohibits the importation of such article. The former act would operate upon the domestic production thereof and former importations and subsequent importations made in violation of the later act.

But if the article is not one of domestic production and its importation is actually prevented by the later act, yet no repugnancy would exist between the two acts, but after the exhaustion of the supply on hand it would only present a condition where there is no subject upon which the former law could operate. Its provisions, however, would remain in force to be executed whenever occasion therefor should arise.

I have, therefore, no doubt that the provisions in question of the earlier act are still in full force and may be executed notwithstanding the later act of February 9, 1909. And I am further of the opinion that nothing in the above act of 1909 or in any other act has abrogated or dispensed with the necessity of observing each and all of the requirements of section 37 of said first-mentioned act as to notices, inventories, bonds, books, returns, etc., as there provided.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

## INSPECTION OF STEAM MOTOR BOATS.

The engine, boiler, or other operating machinery of a steam motor boat more than 40 feet in length is subject to inspection by the local inspectors of steam vessels, and the design thereof is subject to their approval, by the proviso to section 1 of the act of June 9, 1910 (36 Stat. 462), which act repealed by implication so much of section 4426 of the Revised Statutes as requires inspection of small steam vessels of the motor-boat class, but it did not repeal prior laws relating to the inspection of motor boats propelled otherwise than by steam.

DEPARTMENT OF JUSTICE,  
*May 29, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, in which you say:

"\* \* \* In issuing regulations under the motor-boat act (see Department Circular No. 225, inclosed herewith), a ruling was made to the effect that the approval of the design of the engine, boiler, and other operating machinery of steam motor boats more than 40 feet, but not more than 65 feet in length, required by the act of June 9, 1910, was in addition to the inspection of steam vessels provided for by section 4426 of the Revised Statutes (see rule 13). The correctness of this regulation has been questioned by the Honorable William E. Humphrey, M. C., in a letter to the department, dated May 5, 1911, which, with its inclosures, is transmitted herewith. In view of the doubt thus raised as to the validity of the regulation, I have the honor to request your opinion as to whether the same is in conformity with law, or in conflict therewith."

No actual case is presented involving the application of the regulation. This being so, I might well decline to render an opinion upon the question submitted. (20 Op. 536; 21 ib. 109, 509, 568.) As it appears, however, that in making this regulation your department was influenced somewhat by the views expressed by this department in a letter to the United States attorney for the district of Maryland, dated March 14, 1911, relating to the inspection of a gasoline motor boat, which was called to your attention, I feel that I should comply with your request.

Section 4426 of the Revised Statutes provides:

"SEC. 4426. The hull and boilers of every ferry-boat, canal-boat, yacht, or other small craft of like character, pro-

pelled by steam, shall be inspected under the provisions of this title. \* \* \*

By the act of May 16, 1906 (34 Stat. 193), section 4426 of the Revised Statutes was amended by adding thereto, among other provisions, the following, which was substantially a reenactment of the act of January 18, 1897 (29 Stat. 489):

"\* \* \* All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States relating to the inspection of hulls and boilers and requiring engineers and pilots, \* \* \*."

The act of June 9, 1910 (36 Stat. 462), is entitled "An act to amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." Its first section reads:

"*Be it enacted*, etc., That the words 'motor boat' where used in this act shall include every vessel propelled by machinery and not more than sixty-five feet in length, except tug boats and tow boats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided*, That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam."

The proviso to this section is the only provision in the act bearing upon the subject of inspection.

Section 9 of this act provides "that all laws and parts of laws only in so far as they are in conflict herewith are hereby repealed."

As indicated by the quotation from your letter, you have construed the requirement of the proviso to the first section of the act of June 9, 1910, as to the approval of the design of the engine, boiler, and other operating machinery on steam motor boats more than 40 feet in length, as creat-

ing an addition to the inspection of steam vessels provided for by section 4426 of the Revised Statutes. In my opinion this construction is erroneous. The proviso referred to covers the inspection of steam motor boats more than 40 feet in length, as well as the approval of the design thereof by inspectors of steam vessels, and, in my judgment, was intended to supersede the provisions of existing law relating to the inspection of steam vessels so far as respects steam vessels included within the motor-boat class.

The history of the act confirms this view. The bill (S. 7359, 61st Cong. 2d sess.) as originally introduced, did not include vessels propelled by steam in the motor-boat class. It provided "that the words 'motor boat' when used in this act shall include any vessel as defined in section three of the Revised Statutes, *if propelled by machinery other than by steam* and less than sixty-five feet in length." The bill was amended in the Senate so as to provide that "steam vessels not more than forty feet in length used exclusively for pleasure purposes shall be considered as motor boats and be subject hereafter only to the provisions of law relating thereto." The House amended the Senate bill so as to include in the definition of "motor boats," steam vessels not more than 65 feet in length, except tugboats and towboats. It also, in lieu of the provision subjecting steam vessels *not more than* 40 feet in length only to the provisions of law relating to motor boats, provided for the inspection of the engine, boiler, or the operating machinery of steam motor boats *over* 40 feet in length, and for the approval of the design thereof.

This action of Congress appears to have been contrary to the recommendation made by the Department of Commerce and Labor that this subject be not dealt with in this act. In a letter to the chairman of the Senate Committee on Commerce in regard to the bill, which is incorporated in the House and Senate committee reports thereon (Senate Report No. 587; House Report No. 1162, 61st Cong., 2d sess.), the Acting Secretary of Commerce and Labor said:

"The Department is aware that *in the matter of the inspection of hulls and machinery*, license of officers, and other particulars *the laws make considerable distinction between steam-boats and motor boats*. It has been urged on the one hand

to recommend that in this bill motor boats be subjected to many of the statutory requirements now prescribed for steam vessels. *On the other hand it has been urged to recommend that steam vessels be exempted in this bill from many requirements of law not now applicable to motor boats.* While much may be urged by special interests for or against either of these propositions *the Department is opposed to the use of this bill as a vehicle to carry such propositions into law.* Such propositions may well be considered separately on their merits by Congress."

Under existing law, only motor boats above 15 gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, are made subject to the provisions of section 4426 of the Revised Statutes relating to the inspection of hulls and boilers. All other motor boats are exempt from such inspection. On the other hand, section 4426 requires the inspection of every steam vessel referred to therein without regard to its size. In the act of June 9, 1910, notwithstanding the objection of your department, Congress seems to have intended to remedy this discrimination to some extent by placing certain steam vessels within the motor-boat class, and providing for the inspection, etc., of such only as were over 40 feet in length.

In my opinion, therefore, the act of June 9, 1910, repeals by implication so much of section 4426 of the Revised Statutes as requires the inspection of small steam vessels of the motor-boat class as defined in the act of 1910, and such vessels are now subject to inspection by the local inspectors of steam vessels only to the extent prescribed by that act.

I adhere, however, to the view expressed in the department's letter of March 14, 1911, to the United States attorney for the district of Maryland, to the effect that the act of June 9, 1910, did not repeal prior laws relating to the inspection of motor boats propelled otherwise than by steam. The act of June 9, 1910, contains no provision whatever as to the inspection of this class of motor boats, and it provides that "all laws and parts of laws *only* in so far as they are in conflict herewith are hereby repealed."

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.



116 *Appointments in Department of Commerce and Labor.*

APPOINTMENTS IN THE DEPARTMENT OF COMMERCE AND  
LABOR.

The deputy commissioner of fisheries must be appointed by the President, by and with the advice and consent of the Senate, and where such appointment is made by the head of the department it is illegal and the incumbent's status is that of a *de facto* officer. A new appointment is not made necessary, however, merely by reason of the increase of the salary of the office.

The Chief of the Division of Alaska Fisheries, in the Bureau of Fisheries, the character of whose duties is not unlike that of the chiefs of divisions generally in the several executive departments, should be appointed by the Secretary of Commerce and Labor.

The agents in the Alaska fur-seal fisheries service and the agents and inspector in the Alaska salmon fisheries service, whose positions were placed in the Division of Alaska Fisheries by the act of March 4, 1911 (36 Stat. 1439), need not be reappointed, since the mere creation of a new administrative division in which such positions are placed does not establish new offices; the new positions of agent, Alaska salmon fisheries and of warden and deputy wardens, Alaska service, in the Division of Alaska Fisheries, should be filled by appointments made by the President, by and with the advice and consent of the Senate, as the duties of these officers are manifestly not clerical.

The naturalist, fur-seal fisheries, and the two physicians, Pribilof Islands, placed in the Division of Alaska Fisheries by the act of March 4, 1911 (36 Stat. 1439), should be appointed by the Secretary of Commerce and Labor, but as the Secretary has already made these appointments there is no necessity for their reappointment if the present incumbents are to be retained.

The positions of engraver and electrotyper or photographer in the Bureau of Coast and Geodetic Survey, and the positions of associate physicist, assistant physicist, assistant chemist, laboratory assistant, aid, and superintendent of mechanical plant, in the Bureau of Standards, fall within the provisions of section 169 of the Revised Statutes and should be filled by appointments made by the Secretary of Commerce and Labor.

The position of local agent, Seattle, Wash., in the Bureau of Fisheries, the duties of which are strictly clerical, is within the meaning of section 169 of the Revised Statutes and the appointment should be made by the Secretary of Commerce and Labor.

DEPARTMENT OF JUSTICE,

*June 1, 1911.*

SIR: Under date of April 20, 1911, you wrote that, "by reason of certain provisions of the sundry civil appropriation act for the ensuing fiscal year, considered in connection with other legislation and with corresponding provisions of

the current appropriation act, this department is called upon to determine whether in the case of certain positions the reappointment or new appointment of present incumbents is necessary, and whether, where new appointments are required in any case, they must be made by the President by and with the advice and consent of the Senate or may be made by the Secretary of Commerce and Labor."

You therefore request my opinion upon the several questions set forth below.

1. The office of Deputy Commissioner of Fisheries was created by an item in the sundry civil appropriation act of 1903 (32 Stat. 1102), appropriating \$3,000 for the annual salary of such an officer. The act failed to specify how or by whom the appointment should be made, and the place was filled by the appointment of the present incumbent by the head of the Department of Commerce and Labor. The salary of \$3,000 has been continued regularly in subsequent appropriation acts, and by the sundry civil appropriation act of March 4, 1911 (36 Stat. 1363, 1435), the compensation is increased to \$3,500 per annum, effective July 1, 1911.

Upon this state of facts, you inquire:

"Should the position of Deputy Commissioner of Fisheries be filled by appointment or reappointment, effective July 1, 1911, assuming the intention to be to retain the present incumbent? If such appointment is necessary, must it be made by the President by and with the advice and consent of the Senate or may it be made by the head of the department? If it may not be made by the head of the department, is the existing appointment of the present incumbent a valid one?"

The Constitution provides (Art. II, sec. 2) that all officers of the United States shall be appointed by the President by and with the advice and consent of the Senate, except where, in case of inferior officers, Congress shall otherwise provide by law. The general rule deducible from this provision is that, in the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate. (6 Op. 1; 15 ib. 3, 449; 17 ib. 532; 18 ib. 98. 298; 26 ib. 627.)

118 *Appointments in Department of Commerce and Labor.*

There being no specific statutory authority given you to appoint the Deputy Commissioner of Fisheries, it is clear that you do not possess such authority unless the position comes within the scope of section 169 of the Revised Statutes, which provides that "each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year."

It was held by Attorney General Pierrepont, in 15 Op. 3, that a Deputy Comptroller of the Treasury, a deputy commissioner of customs, a Deputy Auditor of the Treasury, and a Deputy Register of the Treasury did not come within the scope of section 169 of the Revised Statutes so as thereby to vest their appointment in the head of the Treasury Department. There being no express statutory provision for the appointment of such officers, it was held that they could only be appointed by the President by and with the advice and consent of the Senate.

Likewise, in 26 Op. 627, Attorney General Bonaparte held that a Second Deputy Comptroller of the Treasury was not a clerk within the meaning of section 169 of the Revised Statutes, and must be appointed by the President by and with the advice and consent of the Senate, there being no express statutory provision for the appointment of such officer.

The office of Deputy Commissioner of Fisheries is of like grade to those offices just mentioned. While his duties are not prescribed by statute, the title of the office necessarily implies a power to perform all the duties which might be performed by the Commissioner of Fisheries, the nature of whose office is defined by sections 4395 and 4396 of the Revised Statutes, and whose appointment is vested in the President by and with the advice and consent of the Senate.

This case is parallel to that of the Second Deputy Comptroller of the Treasury, above cited, the office of such

deputy having been created merely by an appropriation, as in the present case, without prescribing his duties. As said in that opinion (26 Op. 630):

"Generally speaking, a deputy has power to do every act which his principal may do, and is not restrained to some particulars of his office. (Throop on Public Officers, sec. 583; Mechem on Public Officers, sec. 570; *Erwin v. United States*, 37 Fed. Rep. 470.) Doubtless it was on account of this general rule and with the intention that there should be no restriction that Congress did not deem it necessary to prescribe specifically the duties of the additional Deputy Comptroller."

Following with approval the ruling in the cases cited, I beg to advise you that the present incumbent of the office of Deputy Commissioner of Fisheries is not legally appointed, his present status being a *de facto* officer. The appointment must be made by the President by and with the advice and consent of the Senate. A new appointment of the Deputy Commissioner of Fisheries, effective July 1, 1911, is not made necessary, however, merely by reason of the increase of the salary of the office. (1 Comp. Dec. 267; *ib.* 313; 3 *ib.* 336.)

2. The position of Chief of the Division of Alaska Fisheries, in the Bureau of Fisheries, at a salary of \$3,500, is provided for for the first time by the sundry civil appropriation act of March 4, 1911, and the act is silent as to how or by whom the position shall be filled. Under the circumstances, you request my opinion as to whether the appointment must be made by the President by and with the advice and consent of the Senate, or whether it may be made by the head of the department.

I am not advised that the duties of this officer are defined by statute, and infer that the general character of his duties is not unlike that of chiefs of division generally in the several executive departments. It seems to be the practice to regard such chiefs of division as clerks, within the meaning of section 169 of the Revised Statutes, to be appointed by the heads of departments in the absence of express statutory provisions to the contrary.

120 *Appointments in Department of Commerce and Labor.*

In 21 Op. 364, Attorney General Harmon, in holding that the power of appointment of the chief clerk, chiefs of bureaus, and translator in the State Department was vested in the Secretary of State, said: "The chiefs of division in various departments have, I believe, always been regarded as clerks, and this construction has received the approval of the Attorney General." (15 Op. 3, 6; 20 Op. 728.)

You are accordingly advised that the Chief of the Division of Alaska Fisheries should be appointed by you.

3. The Division of Alaska Fisheries was created by the sundry civil appropriation act of March 4, 1911, with a chief of division, above referred to, and clerical assistance, and there were placed under this division the officers in the Alaska fur-seal fisheries service and the Alaska salmon fisheries service.

The act provides for the fur-seal fisheries, one agent, \$3,650; assistant agent, \$2,920; two assistant agents, at \$2,190 each; and for the Alaska salmon fisheries, one agent, \$2,500; inspector, \$1,800; assistant agent, \$2,000. These positions appear to be in no essential particular different from those provided for the same service in the sundry civil appropriation act for the fiscal year 1911 (36 Stat. 703). You state that "no change has been made in the salary and no appreciable change in the designation. The duties will be identical and there is no intention of changing the incumbents."

There were created the following new positions in the Division of Alaska Fisheries, for the Alaska salmon fisheries service: One assistant agent, \$1,800; warden, \$1,200; four deputy wardens, at \$600 each.

In regard to the foregoing, you inquire:

"Under the circumstances, is there any necessity for the reappointment, effective July 1, 1911, of the four seal agents, the two salmon agents, and the one salmon inspector now holding the positions referred to? In the case of certain new positions created by the later act, namely, one assistant salmon agent, one salmon warden, and four

deputy wardens, may appointments thereto be made by the head of the department?"

Answering your first question, I beg to say that I can see no legal necessity for the reappointment of the present incumbents of the offices referred to. There appears to be no evidence that it was the intention of Congress to abolish the existing positions and create new ones. The mere creation of a new administrative division in which such positions are placed does not establish new offices. The existing offices are, in my judgment, continued.

In regard to the new positions mentioned in the second question, I think appointments thereto must be made by the President, by and with the advice and consent of the Senate. I am aware of no express statutory authority given you to make such appointments. These are officers whose duties are manifestly not clerical, nor can they, in my judgment, be considered otherwise within the scope of section 169 of the Revised Statutes.

Furthermore, it is to be noted that the existing agents in the Alaska salmon fisheries service are required to be appointed by the President, by and with the advice and consent of the Senate. The sundry civil appropriation act approved April 28, 1904 (33 Stat. 478), provided as follows:

"For the protection of the salmon fisheries of Alaska, including salaries of one agent, at two thousand five hundred dollars, and one assistant agent, at two thousand dollars, to be appointed by the President, by and with the advice and consent of the Senate, and to be in lieu of any and all agents or inspectors now authorized by law for this purpose, seven thousand dollars."

4. By the act of March 4, 1911, there are also placed in the Division of Alaska Fisheries, among other positions, a naturalist, fur-seal fisheries, at \$3,000, and two physicians, Pribilof Islands, at \$1,200 each.

You state that a naturalist was originally appointed by the head of the Department of Commerce and Labor, at \$3,000, under authority of the act of April 21, 1910 (36 Stat. 326). I am also advised informally by the Solicitor of your department that the two physicians referred to

are for the Alaska fur-seal fisheries service; that they were likewise appointed, and are now in the service.

The act of April 21, 1910, is entitled "An act to protect the seal fisheries of Alaska, and for other purposes," and by its first section the Secretary of Commerce and Labor is authorized to appoint officers, agents, and employees to carry into effect the provisions of said act in relation to killing fur seals and the taking of seal skins on the Pribilof Islands. Section 9 provides "that the Secretary of Commerce and Labor shall have authority to appoint such additional officers, agents, and employees as may be necessary to carry out the provisions of this act and the laws of the United States relating to the seal fisheries of Alaska, to prescribe their duties and to fix their compensation; \* \* \*."

You are thus given complete authority over all necessary appointments to the Alaska fur-seal fisheries service; and it appears that you have exercised that authority in the case of the naturalist and the two physicians. In merely making specific appropriations for these positions there was obviously no intention on the part of Congress to create new positions.

My answer to your inquiry concerning these positions is, therefore, that you are authorized to make appointments thereto, and that if the present incumbents are to be retained, there is no necessity for their reappointment effective July 1, 1911.

5. By the sundry civil appropriation act of March 4, 1911, the following new positions are created, in the Bureau of Coast and Geodetic Survey, at the annual compensation stated: One engraver, at \$2,400; two engravers, at \$2,200; one electrotyper or photographer, etc., \$2,400; in the Bureau of Fisheries; one local agent, Seattle, Wash., \$600.

By the legislative, executive and judicial appropriation act of March 4, 1911 (36 Stat. 1231), there are created the following new positions in the Bureau of Standards, at the annual compensation stated: One associate physicist, \$2,500; one associate physicist, \$2,200; one associate physicist, \$2,000; one assistant physicist, \$1,800; one assistant

physicist, \$1,600; one assistant chemist, \$1,800; two assistant physicists, at \$1,400 each; two laboratory assistants, at \$1,200 each; two laboratory assistants, at \$1,000 each; two laboratory assistants, at \$900 each; three aids, at \$720 each; three aids, at \$600 each; one superintendent of mechanical plant, \$2,500.

You ask which, if any, of the positions must be filled by appointment made by the President by and with the advice and consent of the Senate and which may be made by the head of the department.

In my opinion all these positions fall within the provisions of section 169 of the Revised Statutes, and should, therefore, be filled by appointments made by you. While, as indicated by their designations, they are in the main positions requiring technical skill, the same is true of many other places in the classified civil service. In 21 Op. 363, 364, Attorney General Harmon held that a "translator, an official whose existence is recognized only in the annual appropriation act, and whose duties are purely clerical," was a clerk within the meaning of section 169. The same may be said of the places here in question. The act simply provides for the employment of certain persons with technical skill, who are properly to be regarded as clerks rather than officers. As said by Attorney General Pierrepont (15 Op. 6), referring to section 169, "that clause was unquestionably intended to have a very comprehensive scope, and to embrace a variety of subordinate officers in the different departments besides those designated as clerks of the first, second, third, and fourth classes," and in view of the fact that section 169 is a standing provision, it is also fair to assume that Congress did not intend it to be limited to the classes of clerks "recognized by law" at the time of the revision.

In the case of the local agent at Seattle, Wash., I am advised informally by the Bureau of Fisheries that his duties are to be strictly clerical.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.



EXTENT OF ATLANTIC AND PACIFIC AND SOUTHERN  
PACIFIC GRANTS—MINERAL INDEMNITY SELECTIONS.

Under the act of July 27, 1866 (14 Stat. 292), granting lands to the Atlantic & Pacific Railroad Co. and to the Southern Pacific Railroad Co., the grantees are entitled to 20 odd-numbered sections of land per mile on each side of the line, or 40 sections per mile in all, through Territories, and 10 odd-numbered sections per mile on each side of the line, or 20 sections per mile in all, through States, extending laterally from the line of road.

The railroad companies by the third proviso to section 3 of the act of July 27, 1866 (14 Stat. 295), must obtain their mineral indemnity lands from the odd-numbered sections within 20 miles from the line of road which were entered by individuals prior to the time when the rights of the companies attached, but which have since been canceled or abandoned.

DEPARTMENT OF JUSTICE,  
*June 2, 1911.*

SIR: On October 6, 1910, Secretary Ballinger asked this department for a construction of the act of July 27, 1866 (14 Stat. 292), section 18 of which granted lands to the Southern Pacific Railroad Co. That section makes a grant to the railroad company similar to the grant contained in the same act to the Atlantic & Pacific Railroad and subject to all the conditions and limitations thereof. The grant to the Atlantic & Pacific Co. is as follows:

"SEC. 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed

in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

And section 18 is as follows:

"That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

The letter of October 6 informed this department that Mr. B. D. Townsend, special assistant to the Attorney General, and a Mr. Hinkley had called at your department and asserted that its administration of these grants had been erroneous, in that Congress intended that their limits should be 20 miles on each side of the line of road through Territories and 10 miles on each side through States, the railroad companies to have the odd-numbered sections. Mr. Ballinger further stated that your department had always construed this grant as it had similar grants to other railroad companies—as giving to the grantees the odd-numbered sections within place limits of 40 miles on each side of the road through Territories and 20 miles on each side of the road through States. The letter of October 6, 1910, presented for my consideration a hypothetical question, and I verbally informed Mr. Ballinger that it is

not within the province of this department to answer questions of that character. On March 10, 1911, however, he again wrote me, referring to the letter of October 6, 1910, and stated that the Southern Pacific Railroad Co. had filed a list seeking a patent to certain lands in California, which lands, he stated, are within the limits of the grant as construed by your department, but more than 10 miles and within 20 miles of the line of road.

Mr. Ballinger and Mr. Lawler, subsequent to the letter of October 6, have advised me that the letter of that date inadvertently referred to Mr. B. D. Townsend as having accompanied Mr. Hinkley in presenting the contention made by him concerning the grant. Mr. Townsend's visit to your department had no reference to this matter.

So far as concerns the quantity of land intended to be granted by it, the act of 1866 appears to me to be quite plain and free from ambiguity, and as the letters from your department do not suggest any basis for doubt as to its proper interpretation, I have examined the report of Mr. Hinkley's oral argument before Judge Ross on demurrer to the bill of complaint in the cases of *George D. Roberts v. The Southern Pacific Company*, No. 177, and *Edmund Burke v. The Southern Pacific Railroad Company et al.*, No. 192, recently decided in the Circuit Court of the United States for the Southern District of California, for a statement of his construction of the act of Congress. From that report I find it contended that Congress granted to the companies only one-half the quantity allowed them by your department, i. e., that the grant was limited to a territory extending only 20 miles on each side of the line of railroad in Territories and 10 miles in States. In my opinion the contention is directly contrary to the plain reading of the act. Section 3 grants to the company—

“every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State \* \* \*.”

That the grantees were to have 40 odd-numbered sections through Territories and 20 odd-numbered sections through States, bisected by the line of road, is as plain as the English language can make it; and unless some other provision of the grant renders this view absurd or unjust, we are not permitted to depart from it. As said by the Supreme Court in *Lake County v. Rollins*, 130 U. S. 662, 670:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell v. People*, 7 N. Y. 9, 97; *Hills v. Chicago*, 60 Illinois, 86; *Denn v. Reid*, 10 Pet. 524; *Leonard v. Wiseman*, 31 Maryland 201, 204; *People v. Potter*, 47 N. Y. 375; *Cooley*, Const. Lim. 57; Story on Const., sec. 400; *Beardstown v. Virginia*, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States v. Fisher*, 2 Cranch, 358, 399; *Doggett v. Florida Railroad*, 99 U. S. 72."

This grant to the Southern Pacific Railroad Co. is similar to others of the same character made to other Pacific railroads, all of which have always been considered, if not actually construed, by your department and the courts in accordance with this view, and it would require quite a clear error, after this long period of construction and enforcement, to warrant a reversal. I need not refer to the numerous decisions which at least assume that the company is entitled to 40 and 20 odd sections, through Territories and States, respectively, divided by the line of road, as they are well known to your department.

It was contended in the Roberts and Burke cases that the provision for survey in section 6 of the granting act—

“That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road. \* \* \*” ——— means that the entire width of the survey was to be but 40 miles. It is argued that the purpose of the survey was to fix both the primary and indemnity limits of the grant. But this is a fundamental error: Grants of this character almost invariably provide for survey of a strip equal to the primary or place limits; indemnity or lieu land can be obtained only when the Interior Department, in due course, surveys the indemnity area. It is true that as to States the Southern Pacific survey would cover the indemnity limits and more, but Congress evidently was governed by the thought that the maximum width surveyed should, upon economical considerations, extend through States as well as Territories. But perhaps the more effective answer to this contention is that if, as Mr. Hinkley contends, Congress meant that the place limits should be 20 and 10 miles, respectively (on each side of the line), instead of 40 and 20, the survey, were it intended to cover both place and indemnity limits along the entire line of road, could not by any possibility be 40 miles in width, for the indemnity limit is “not more than 10 miles beyond the limits of said alternate (primary) sections;” and if Mr. Hinkley’s theory that through Territories the place limits are 20 miles on each side of the road be correct, the total limit, primary and indemnity, would be 30 miles from the line of road, which, of course, does not comport with a 40-mile survey.

The mineral indemnity land provision of the grant is next referred to. It is found in the third proviso to section 3, which is:

“*Provided further, That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided.*”

It is said that if the claim of the railroad company to 10 sections on each side of the road through States or place limits of 20 miles on each side be correct, the place limits would be 20 miles from the line of road, which would make those limits the same as the mineral indemnity limit. There are several answers to this position: First, if the theory that through Territories the company is entitled only to 10 sections on each side be correct, we are confronted with the same objection regarding the mineral indemnity limit which is urged against the company's position as to the primary limits in States, for upon that theory the Territory limits would also be 20 miles on each side—coextensive with the mineral indemnity. Second: It is true that this mineral indemnity provision is somewhat peculiar, in that it throws the indemnity limits within the primary limits, and this anomaly is observed in 26 L. D. 452, wherein it was decided that a homestead entry which was within these indemnity limits and which had been canceled was open to selection as mineral indemnity by the company. I quote from the opinion of Secretary Bliss:

“Without discussing this peculiar provision of the act, the selections in question meet the terms thereof, and as they are free from other claim or right I have approved the list submitted, which is herewith returned as a basis for patent.”

The railroad company, then, according to the terms of the statute, must obtain its mineral indemnity lands from the odd-numbered sections within 20 miles from the line of road which were entered by individuals prior to the time when the company's rights attached, but which have since been canceled or abandoned. Here again the statute is plain, and even though the indemnity grant can not be fully satisfied (which condition I learn has not yet arisen), it must be remembered that this has often been the case and that the grant to the railroad company was not one of quantity nor is there any implied guaranty that its greatest possibilities would ever be realized. (6 L. D. 84; *Southern Pacific R. R. Co. v. United States*, 183 U. S. 519; *Southern Pacific Railroad Co. v. Bell*, *ibid.* 675; *Barney v. Winona, &c., R. R. Co.*, 117 U. S. 228; *Sioux City, &c.,*

*R. R. Co. v. United States*, 159 U. S. 349.) To amplify the argument on this point it was contended that the indemnity limits were not intended to fall within the place limits, because homestead and other entries which attached prior to the filing of the map and which were afterwards abandoned or canceled can not be selected under the mineral indemnity provision. In support of this position there were cited *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629, and *Bardon v. Northern Pacific Railroad Co.*, 145 U. S. 535. But those cases are to the effect that railroad grants which, as does the Southern Pacific grant, except from their operation lands "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of" prior to the filing of the map, and which were afterwards canceled or abandoned, do not pass as a part of the *primary* grant upon such cancellation or abandonment, but are reserved from its operation for all time. There was no question of indemnity involved in either of those cases. Indeed, in the nature of things, no indemnity land can pass by the grant until it is selected. And, finally, the contention is wholly negatived by the decision of Secretary Bliss, *supra*.

The argument against the practical construction which has been given to this grant by your department probably had its origin in what must, in view of that construction, be taken to be a clerical error found in 6 L. D. 349, 351. Secretary Lamar, in the overlapping cases, used this language:

"The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land, not of the character excepted by the grant, *and within the 10-mile limit*, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic and Pacific Company." (*Italics are mine.*)

And much importance seems to be attached to the fact that Mr. Justice Brewer, in the overlapping cases reported in 183 U. S. 519, 525, used a quotation from Secretary Lamar's opinion, *supra*, which included the language above quoted.

But the question now before me was not raised in those cases and never has been, so far as I can discover, except in the Roberts and Burke cases, the opinion in which is silent as to the extent of the primary and indemnity limits of the grant.

It is lastly contended that all doubt must be resolved in favor of the grantor. But in view of what I have said, I see no room for the application of this principle.

I therefore advise you that the grantees under the act of July 27, 1866, are entitled to 20 odd-numbered sections per mile on each side of the line, or 40 sections per mile in all, through Territories, and 10 odd-numbered sections per mile on each side of the line, or 20 sections per mile in all, through States, extending laterally from the line of road.

Very respectfully,

J. A. FOWLER,

*Acting Attorney General.*

THE SECRETARY OF THE INTERIOR.

---

INDIAN ALLOTMENT LANDS—ALIENATION.

Lands allotted to the Choctaw and Chickasaw Indians under the act of July 1, 1902 (32 Stat. 641), could not be conveyed prior to the act of April 26, 1906 (34 Stat. 137), by the full-blood heirs of said allottees within the period of inhibition named in the former act; and such attempted conveyances could not be validated by the approval of the Secretary of the Interior under the provisions of section 22 of the latter act, as that section is not retroactive.

DEPARTMENT OF JUSTICE,

*June 7, 1911.*

SIR: I am in receipt of your letter of April 28, 1911, requesting my opinion as to whether a conveyance executed by full-blood heirs of a full-blood Choctaw or Chickasaw allottee prior to April 26, 1906, is subject to the approval of the Secretary of the Interior under the provisions of section 22 of the act of April 26, 1906 (34 Stat. 137), and, if not, whether valid title passes without such approval. You say further:

"In your opinion dated August 17, 1909, construing section 9 of the act of Congress approved May 27, 1908



(35 Stat. 312), you held that its provisions were not retroactive and that all conveyances by full-blood Indian heirs of a deceased allottee who died prior to May 27, 1908, must, in order to pass a valid title thereto, be approved by the Secretary of the Interior.

“The point upon which your opinion is requested is whether the similar provision of section 22 of the act of Congress approved April 26, 1906 (34 Stat. 137), can be construed to apply to conveyances executed prior to April 26, 1906, and whether such conveyances so executed must receive the approval of the Secretary of the Interior before a valid title to the land passes by such conveyances.”

From the papers accompanying your letter, it appears that a patent to the surplus lands of Lucy Cole, a full-blood Choctaw Indian, was approved by the Secretary of the Interior October 27, 1905, a few days prior to her death, which occurred November 1, 1905, and that a deed executed by her heirs purporting to convey her surplus lands is dated April 11, 1906, 15 days before the approval of the act of April 26, 1906. This deed is before you for approval and a question of law arising in the administration of your department is therefore presented.

The Choctaw and Chickasaw Nations held their lands by grant from the United States. Their title is defined by the treaty of June 22, 1855 (11 Stat. 611), as follows:

“And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* No part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same.” Under section 2116, Revised Statutes United States, these lands were inalienable without the consent of the United States; *Johnson v. McIntosh*, 8 Wheat. 543; *Jones v. Meehan*, 175 U. S. 1.

Under the acts of June 28, 1898 (30 Stat. 495, 505-507), and July 1, 1902 (32 Stat. 641), providing for the allotment of their lands to the citizens of the Choctaw and Chickasaw Nations individually, the allottees received titles in fee, with certain restraints upon alienation. Sections 12, 15, and 16 of the act of July 1, 1902, which is an act to ratify and confirm an agreement made by the Commission to the Five Civilized Tribes with a commission representing the Choctaw and Chickasaw Tribes, on March 21, 1902, are as follows:

"SEC. 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"SEC. 15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"SEC. 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value." As provided by section 15, none of the lands could be sold except as provided by the act. There is no provision in the act for the sale of any of these lands by the allottees or their heirs within a year from the date of patent. The restraints upon alienation are not personal to the allottees, but run with the land. *Goodrum v. Buffalo*, 162 Fed. 817;

*Ewers v. Buffalo*, 162 Fed. 828. The act of April 21, 1904 (33 Stat. 189, 204), provides that—

“All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for land are recorded.”

The supreme court of Oklahoma, in the case of *Parkinson v. Skelton*, not yet published, holds that these provisions do not apply to inherited lands. However, there is nothing in the papers submitted by you which indicates that any attempt was made to secure the removal of the restraint on alienation from the allotment of Lucy Cole under the provisions of this act. There was no further legislation relating to the lands allotted to full-blood Chocktaws or Chickasaws until the act of April 26, 1906. The allotment to Lucy Cole was made under the provisions of the act of July 1, 1902. As the deed purporting to convey the lands inherited from her was made within a year after the patent was issued, it follows that it was a void instrument and that this was its condition when the act of April 26, 1906, became a law.

Section 22 of the act of April 26, 1906 (34 Stat. 137, 145), which you desire to have construed, is as follows:

“SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she

belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

If this section is not retroactive, sales attempted to be made by the full-blood heirs of deceased allottees prior to April 26, 1906, can not be given any effect whatever by your approval of them. If it is retroactive, such sales are not valid without your approval.

There is nothing in the language which indicates an intention to make it retroactive. In the phrases "may sell and convey the lands" and "may join in a sale of such lands," the verbs are in the present tense and indicate simply that the power to sell shall become operative when the act becomes effective. The language used is permissive, and this use of the potential "may" always refers to time subsequent to the moment of the permission or grant of power unless otherwise clearly stated in modifying words or phrases; *Greene v. Robinson*, 41 Conn. 470, 471; *Words and Phrases Judicially Defined*, vol. 5, p. 4419. That part of the section defining the action of the Secretary of the Interior, viz:

"All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe,"

does not modify the previous part as to the time when it shall become effective nor as to the character or dates of the conveyances to be made under its provisions. Nor is

there anything in the other sections of the act which lends any color to the view that the section was to have a retroactive effect.

Under the general rule of construction a statute is not retroactive unless its language clearly so indicates:

The general rule of construction is that statutes "are construed as operating only on cases or facts which come into existence after they are passed, unless a retrospective effect be clearly intended." (Endlich on Interpretation of Statutes, sec. 271.)

"It is in the general true \* \* \* that no statute is to have a retrospect beyond the time of its commencement.' \* \* \* A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in matters relating to contracts or property, would violate every sound principle." (Potter's Dwaris, p. 162.)

"It is a well-settled rule that laws are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used." (*Brown v. Hughes*, 89 Minn. 150, 153).

Mr. Justice Alvey, speaking for the court of appeals of Maryland in the case of *Baltimore City Appeal Tax Court v. The Western Maryland Railroad Company* (50 Md. 274, 293-294), said:

"Before a statute can be allowed to have such operation, the court must see that the words are so clear, strong and imperative in their retrospective expression, that no other meaning can be attached to them, or that the plain intention of the legislature could not be otherwise gratified."

The United States Supreme Court said in *Harvey v. Tyler* (2 Wall. 328, 347):

"It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

In the *Twenty Per Cent Cases* (20 Wall. 179, 187) :

“Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.”

And in *Southwestern Coal Co. v. McBride* (185 U. S. 499, 503) :

“The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed.”

Section 15 of the act of July 1, 1902, *supra*, provides that these lands shall not be encumbered by any deed, debt, or obligation of any character contracted prior to the time at which the land may be alienated under the act of which it is a part, nor sold except as therein provided. The deed executed by the heirs of Lucy Cole and the attempted sale it was designed to effect were made in direct violation of this section. If the rule is against a retroactive operation unless such construction is absolutely necessary to give meaning to the language used (*Brown v. Hughes, supra*) and such construction in matters relating to contracts or property would violate every sound principle (Potter's *Dwarris, supra*), it would seem that such construction should be avoided when it would authorize the validation

of deeds which were not only void, but had been made against the clearly expressed command of an act of Congress.

It has become a rule of our law that all treaties with and statutes relating to Indians shall be construed in their favor; *Worcester v. Georgia*, 6 Peters 515, 582; *U. S. v. Choctaw Nation*, 119 U. S. 1; *Jones v. Meehan*, 175 U. S. 1; *United States v. Winans*, 198 U. S. 371; *United States v. Celestine*, 215 U. S. 278. In *United States v. Celestine*, Mr. Justice Brewer, speaking for the court, said, page 290:

“ Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of the reservation.”

The restrictions upon alienation found in Indian treaties and laws are imposed for the benefit of the Indians; *Smith v. Stevens*, 10 Wall. 321, 326. It follows that any doubt as to the meaning of subsequent acts should be resolved in favor of the retention of such restrictions. By virtue of the restraint upon alienation in the act of July 1, 1902, the attempt made by the heirs of Lucy Cole to sell the land inherited from her was ineffectual, and the lands were still vested in them as fully as before the deed was executed; their title was perfect at all times after the death of their ancestor—at least until the approval of the act of April 26, 1906. Even if the intent of the statute could be said to be doubtful, it would have to be construed in favor of the restraint and against a retroactive operation.

I am of the opinion that on April 11, 1906, the day on which the deed was executed by the heirs of Lucy Cole, the land described therein was inalienable and, further, that section 22 of the act of April 26, 1906, does not authorize you to approve it, for the reason that it was made prior to the date of that act.

Very, respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

ALTERATION OF METROPOLITAN WEST SIDE ELEVATED  
RAILWAY CO. BRIDGE IN CHICAGO, ILL.

The widening of the channel of the South Branch of the Chicago River by the sanitary district of Chicago, under licenses granted by the Secretary of War, does not connect the Federal Government with that project in such a way as will authorize the Secretary of War, under section 18 of the act of March 3, 1899 (30 Stat. 1153), to require the alteration of the bridge of the Metropolitan West Side Elevated Railway Co. until the widening of the channel and the removal of the filled-in land adjoining the west abutment of the bridge has caused that structure to become an actual obstruction to the free navigation of the river.

Filled-in land is subject to the servitude of navigation, and any obstruction to navigation arising therefrom could be abated by Congress, even if made under authority of a State.

The filled-in land occupied by the west abutment of the bridge in question, which of course could not be removed prior to the removal of the bridge, should be regarded as constituting a part of the bridge, and the Secretary of War may proceed, under section 18 of the act of March 3, 1899 (30 Stat. 1153), for the alteration of the bridge when, by reason of the widening of the channel up to that point, it has become an actual obstruction to the free navigation of the river. In such a contingency notice to remove the same should be given to both the railway company and the sanitary district.

The filling of a navigable waterway for the purpose simply of enabling riparian owners to reach the point of navigability by means of docks, piers, etc., when not forbidden by any statute of the United States or of a State, is neither unauthorized nor unlawful.

DEPARTMENT OF JUSTICE,

*June 9, 1911.*

SIR: Under date of March 7 last you requested my opinion on certain questions in respect to the alteration of the bridge of the Metropolitan West Side Elevated Railway Co. over the South Branch of the Chicago River between Jackson and Van Buren Streets, in the city of Chicago, Ill.

The facts giving rise to the questions propounded are stated by you as follows:

“For about two blocks at this point the channel of the South Branch of the Chicago River has been narrowed to about one-half its present width in other places by filling in, particularly on the west side, nearly all of which filling was done prior to 1880 without the permission of the



United States, and also, it is understood, without the permission of the State of Illinois, unless such permission is to be implied by its nonaction in the matter. Several bridges span the river at the point where the channel has been so narrowed, among them the bridge of the Metropolitan West Side Elevated Railway Co., the west abutment of which rests almost entirely on the ground so filled in. The sanitary district has been engaged, under authority of a statute of the State of Illinois (act of May 29, 1889, Laws, p. 125) and under licenses granted by the Secretary of War under date of May 8, 1899, and January 17, 1902; for some time in widening the existing channel of the South Branch to 200 feet, and to this end has acquired the necessary upland and filled-in land, which latter includes the land upon which the west abutment of the Metropolitan West Side Elevated Railway Co. largely rests. The removal of the filled-in lands along this section of the river is substantially all that remains of the work of widening the channel to the 200-foot line. The sanitary district promises the completion of this work in about two years, and the city of Chicago stands ready to conform its bridges to the general plan of widening the channel, but this would be useless unless the bridge of the Metropolitan West Side Elevated Railway Co. is also enlarged, since the bridges are so close together that the same vessel, in passing through, would occupy two or more bridges at the same time. The foregoing facts are found by the Chief of Engineers after the hearings accorded the parties in interest, as hereinafter stated. Under these facts, the bridge will constitute an unreasonable obstruction to the free navigation of the river, when the channel is widened, as above proposed.

“The bridge of the Metropolitan West Side Elevated Railway Co. was built upon plans approved by the Secretary of War on November 16, 1893, as modified March 27, 1894, such approval being given under the authority of section 7 of the act of Congress approved September 19, 1890 (26 Stat. 426), which makes it unlawful to construct bridges, under legislative authority of a State, across waterways lying wholly within the limits of the State ‘until the location and plans of such bridge or other work

has been submitted to and approved by the Secretary of War,' etc. \* \* \*. It is further to be noted that the bridge was constructed after the city of Chicago had acquired the land on which the west abutment rests, so that the company, when it obtained its license from the city under which it placed the abutment on this property, had notice of the title of the city, and of the fact that the property had been acquired by the city to widen the stream at this locality.

"The improvement proposed and under way by the sanitary district above set forth meets the growing demands of commerce and will provide better facilities for the larger vessels now engaged therein. It is obviously advisable that the work of making the necessary alterations should go on concurrently with the work of widening the channel; and, as a step to this end, a public hearing was given the parties in interest, including the Metropolitan West Side Elevated Railway Co. \* \* \*.

"At the hearings, which were held June 24-25 and July 8-11, 1910, the railway company was represented by attorneys, who contended that the bridge was not an unreasonable obstruction to the free navigation of the river as it exists to-day; that the draw is nearly as wide as the river at this point, and that the company can not be required to remove its west abutment without compensation being first made for the expense involved in such removal. In accordance with the recommendation of the Chief of Engineers following said hearing and a subsequent hearing before the Secretary of War it is proposed to issue a notice to the railway company, under section 18 of the act of March 3, 1899, to make the following alterations in its bridge, to be completed by the dates respectively specified, namely, \* \* \*."

Upon this state of facts you request my opinion upon the following questions:

"(1) Whether the fact that the reclaimed land on which the west abutment of the bridge largely rests was made by filling, without permission from the United States, prior to any general statute of the United States making such filling unlawful, and without express authority from the State

of Illinois, which filling narrowed the normal limits of the channel, will justify me in treating said abutment as located on land which is held subject to the public easement in favor of navigation for the purpose of serving notice on the owner of the bridge to remove the part of the west abutment resting on such reclaimed land? In other words: Does the title to the filled-in land continue to be subject to the use of the same by the United States for the improvement of navigation within the contemplation of section 18 of said act of March 3, 1899?

“(2) Whether the facts stated in question 1, coupled with the fact that when the west abutment of the bridge was built the city of Chicago had acquired the land on which it largely rests for the purpose of widening the channel, so that when the bridge was built under license from the city and with the approval of the Secretary of War, as hereinbefore stated, the company had notice that the land on which it placed the abutment had been acquired and was held by the city for the purpose of straightening or widening the channel; coupled also with the further fact that the sanitary district, having acquired the land from the city for the purpose of widening the channel, and having obtained the approval of the Secretary of War and the Chief of Engineers for such improvement, has made substantial progress in the execution of the project, would justify the department in treating the said abutment as located within the proper limits of the channel for the purpose of extending the notice to alter the bridge so that part of the west abutment which rests on the land reclaimed from the bed of the river and included within the projected limits of the channel? In other words: Has the Secretary War jurisdiction, under section 18 of the act of March 3, 1899, over the projected channel in process of construction and over a bridge which will be an unreasonable obstruction to the free navigation of the channel when the project is completed?”

As I understand your letter, the bridge of the Metropolitan West Side Elevated Railway Co. is not now an actual obstruction to the free navigation of the Chicago River, but will be if the filled-in land adjacent to it for the space

of about two city blocks, and upon a portion of which the west abutment rests, is removed up to the bridge in accordance with the proposed plan of widening the channel 200 feet; and the purport of both your questions is whether the circumstances attending such filling and the construction of the bridge thereon are such as to enable the Secretary of War, proceeding under section 18 of the act of March 3, 1899 (30 Stat. 1121, 1153), to require the alteration of the bridge to meet the prospective needs of navigation.

The statute mentioned provides:

“SEC. 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them \* \* \*.”

In my judgment, the Federal Government has no such connection with the proposed plan of widening the channel of the South Branch of the Chicago River as will authorize the Secretary of War, under existing law, to require the alteration of the bridge in question until the widening of the channel and the removal of the filled-in land adjoining the west abutment of the bridge has caused that structure to become an actual obstruction to the free navigation of the river.

This project for the widening of the existing channel is, I understand, an undertaking of the State of Illinois en-

tirely, the only connection of the Federal Government therewith being that arising from the permission to undertake such work granted by the Secretary of War. Such permission, I assume, was granted under authority of section 10 of the act of March 3, 1899, which makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

If the improvement in question had been directed by Congress, as in the case of the improvement of the Chicago River referred to in *West Chicago Street Railroad Co. v. Chicago* (201 U. S. 506, 516), the Secretary of War doubtless would have authority to require the alteration of the bridge in accordance with such project, without waiting until the channel adjacent to the bridge had been actually excavated. (*United States v. Moline*, 82 Fed. 592.)

In the present case, however, Congress has not directed the widening of the channel, but merely, through the Secretary of War, permitted the State to undertake such work. Whether it will be completed or not at present rests entirely with the State. I am unable to perceive any authority therefore for the Secretary of War, under existing circumstances, to exercise the power granted him by section 18 of the act of March 3, 1899, until the bridge in question has become an obstruction to the free navigation of the river in fact as well as in theory.

Undoubtedly the filled-in land is subject to the servitude of navigation (*Shively v. Bowlby*, 152 U. S. 1, 57, 58; *Gibson v. United States*, 166 U. S. 269, 271, 272; *Scranton v. Wheeler*, 179 U. S. 141, 162-165; *West Chicago Street Railroad Co. v. Chicago*, 201 U. S. 506, 520), and any obstruction to navigation arising therefrom could be abated by Congress, even if made under authority of the State (*Wisconsin v. Duluth*, 96 U. S. 379, 383; *Williamette Iron Bridge Company v. Hatch*, 125 U. S. 1, 12; *Monongahela Navigation Company*

v. *United States*, 148 U. S. 312, 336; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 216; *Union Bridge Company v. United States*, 204 U. S. 364, 391; 27 Op. 311). But it is not a question of the power of Congress but of the power of the Secretary of War; and so far as I am advised there is nothing connected with the proposed improvement by the State or in the legislation of Congress for the protection of the navigable waters of the United States or the improvement of the Chicago River requiring or justifying action by the Secretary with respect to the bridge until it shall have become an actual obstruction to the free navigation of the river.

Assuming that any unauthorized filling of a navigable waterway of the United States which constituted an obstruction to navigation could be abated at the instance of the executive department of the Federal Government without specific authority for such action from Congress (6 Op. 172; 18 ib. 404; *Georgetown v. Alexandria Canal Company*, 12 Pet. 91; *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518; *United States v. San Jacinto Tin Company*, 125 U. S. 273; *United States v. American Bell Telephone Company*, 128 U. S. 315; *In re Debs*, 158 U. S. 564), I am unable to hold, upon the facts stated by you, that the filling in question was unauthorized or constitutes such an obstruction.

You state that "the filling was done prior to 1880 without the permission of the United States, and also, it is understood, without the permission of the State of Illinois, unless such permission is to be implied by its nonaction in the matter." If, however, such filling was not forbidden by any statute of the United States or of the State of Illinois, and was for the purpose simply of enabling riparian owners to reach the point of navigability by means of docks, piers, etc., it would be neither unauthorized nor unlawful (*Yates v. Milwaukee*, 10 Wall. 497, 504-505; *Scranton v. Wheeler*, 179 U. S. 141, 157). This, in fact, is what the Supreme Court of Illinois appears to have ruled in the case of the *Sanitary District of Chicago v. Pittsburgh, Fort Wayne and Chicago Railway Company et al.* (216 Ill.

575), where it was held that the sanitary district must make compensation for taking certain filled-in land on the water front of the Chicago River occupied by the defendants, for the purpose of widening the channel of the river, which land, I understand, included that there in question, or at least was similarly situated. The court said (ib. 581):

“\* \* \* There was evidence that in making excavations between Adams Street and Van Buren Street it was found that the shore line was at some time west of the dock line and that there were remains of an old dock west of said line, but the present dock had existed for a great many years and had been in the possession of the defendants, and so far as the evidence shows the dock was placed where the owners of the abutting land had the legal right to place it, not beyond the line of navigability of the stream and not obstructing navigation or impairing the rights of others. (*City of Chicago v. Laflin*, 49 Ill. 172.) The greater part of the line was not in dispute, and there has never been any controversy between the city of Chicago and the defendants in regard to the location of the dock.”

In this connection it is to be observed that in certain appropriations made by Congress for dredging this part of the Chicago River (act of June 3, 1896, 29 Stat. 202, 228; act of Mar. 3, 1899, 30 Stat. 1121, 1156), it is expressly provided that such improvement shall be made “so far as may be permitted by existing docks and wharves.” So far as I am advised, this authority has not been broadened by subsequent appropriation acts for the improvement of that river.

So, also, section 10 of the act of September 19, 1890 (26 Stat. 426, 454), which prohibited “the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction,” and provided that the continuance of any such obstruction, “whether heretofore or hereafter created,” should constitute a punishable offense, and that any such obstruction might be removed by the injunction of a circuit court of the United States at the notice of the

Attorney General, expressly excepted from its operation "bridges, piers, docks, and wharves."

This provision of the act of September 19, 1890, is apparently the only legislation by Congress with reference to the continuance of existing obstructions. There is no such provision in the corresponding section (10) of the act of March 3, 1899 (30 Stat. 1121, 1151), or in any other section of that act, which (section 20) repeals "all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive," but saves any right of action which accrued prior thereto. It is immaterial, however, to determine whether the provision referred to is in force. If in force, and the filling here in question may be regarded as an obstruction to the "navigable capacity" of the river, it would come within the exception as to "bridges, piers, docks, and wharves, and similar structures erected for business purposes." If repealed, and no other statute of the United States forbids the maintenance of such filling, the right of the Government to cause its removal would seem to depend upon the State law (*Willamette Iron Bridge Company v. Hatch*, 125 U. S. 1, 9), and as above pointed out the Supreme Court of Illinois has apparently held that such filling was lawful. In any event it is not clear, as above stated, that the filling in question was unauthorized or unlawful.

It is true that Congress, through the Secretary of War, has sanctioned the widening of the river, but it has not required that to be done, and the permission to the State to make the improvement carries with it no guarantee on the part of the United States that it shall be made. Whether the work which has been commenced shall be completed at present rests entirely with the State of Illinois. The Secretary of War has no authority to complete the same.

It is true, also, that the benefit of the improvement will inure to the Federal Government. But such benefit will not arise until the improvement is made, and can not, I think, be anticipated by the Secretary of War in the manner suggested. At present he is authorized by the legislation of Congress to require the alteration of the bridge in question



only when it shall have become an actual obstruction to the free navigation of the river.

As to any portion of the filled-in land occupied by the west abutment of the bridge in question, which of course could not be removed prior to the removal of the bridge, a different question would be presented. If the filled-in land is removed up to the bridge, or as far as the maintenance of the bridge will permit, I have no doubt as to your authority to proceed under section 18 of the act of March 3, 1899, for the alteration of that structure and the removal of the filling necessary to its maintenance. In such contingency the filled-in land should be regarded as constituting a part of the bridge, that being the only purpose which it would subserve. In effect the situation would be precisely the same as if the river had been filled in expressly for the purpose of constructing the bridge. Whether, in the contingency referred to, the railway company or the sanitary district should remove the filling used for the maintenance of the bridge, it is unnecessary to determine. Notice to remove the same should be given to both.

In this connection it is to be noted that the Supreme Court of Illinois has held that the sanitary district, although the owner of the land referred to, was estopped from disputing the right of the railway company to use the same for its bridge, in view of the fact that its grantor, the city of Chicago, had permitted the erection of the bridge after it had been acquired for the purpose of widening the river. (*Sanitary District v. Metropolitan West Side Elevated Railway Company*, 241 Ill. 622.) Such estoppel, however, does not affect the Federal Government, and the decisions are clear as to your authority to proceed under section 18 of the act of March 3, 1899, for the alteration of the bridge when, by reason of the widening of the channel up to that point, it has become an actual obstruction to the free navigation of the river. (*West Chicago Street Railroad Company v. Chicago*, 201 U. S. 506; *Union Bridge Company v. United States*, 204 U. S. 364; *Monongahela Bridge Company v. United States*, 216 U. S. 177; *Northern Pacific Railway Company v. Duluth*, 208 U. S. 583; *St. Paul, Minneapolis & Manitoba Railway Company v. Minnesota*, 214

U. S. 497; *Cincinnati, Indianapolis and Western Railway Company v. City of Connersville*, 218 U. S. 336; *Hannibal Bridge Company and Wabash Railroad Company v. United States*, decided May 15, 1911, not yet reported.)

While this bridge was built in accordance with plans approved by the Secretary of War, as required by section 7 of the act of Congress approved September 19, 1890 (26 Stat. 426), it is necessarily subject to the power conferred upon the Secretary of War by sections 4 and 5 of the same act to require the alteration of "any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States" to meet the needs of navigation, which provisions are now embodied in section 18 of the act of March 3, 1899.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

REMISSION OF PENALTY AFTER ENTRY OF FINAL JUDGMENT.

The Secretary of Commerce and Labor has authority, under section 5294, Revised Statutes, to remit or mitigate a penalty after entry of final judgment incurred for violating a provision of law relating to vessels and seamen and discontinue the prosecution.

The costs which are not, as a general rule, charged against the defendant when proceedings are discontinued by the plaintiff, may also be remitted or mitigated by the Secretary in accordance with the provisions of section 5294, Revised Statutes.

DEPARTMENT OF JUSTICE,

June 9, 1911.

SIR: I beg to respond to your request of the 20th ultimo for my opinion as to your authority to remit or mitigate the penalty incurred by Daniel Nevins and discontinue the proceedings against him for a violation of the provisions of section 4438 of the Revised Statutes.

You state in your letter that:

"Judgment by default was entered in the district court of the southern district of New York in the sum of \$139.82

150 *Remission of Penalty after Entry of Final Judgment.*

against Daniel Nevins. The defendant is not able to pay the amount of the judgment and the United States attorney in a letter to the Solicitor of the Treasury dated February 3 last recommends that the judgment be compromised and settlement made by the payment of the sum of \$10. In the total amount of the judgment there were included items of \$18.50 interest and \$21.32 costs."

The question upon which you desire advice, as it is stated by you, is "whether, under the provisions of section 5294, R. S., or of section 3469, R. S.," your "department has authority to withdraw prosecution after a case has gone to judgment on the payment of a sum less than the interest and costs which attach."

Section 4438 of the Revised Statutes, under which the penalty in question was incurred by Nevins, as amended by the act of December 21, 1898 (30 Stat. 764), reads as follows:

"SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters and chief mates of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot of any steamer, or as master or chief mate of any sail vessel of over seven hundred tons who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

Section 3469 of the Revised Statutes is as follows:

"SEC. 3469. Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim

accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

Section 5294, as amended by the act of March 2, 1896 (29 Stat. 39), reads:

"SEC. 5294. The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels or discontinue any prosecutions to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

The act of February 14, 1903 (32 Stat. 825, 829), to establish the Department of Commerce and Labor, provides, section 10, that:

"All duties, power, authority and jurisdiction, whether supervisory, appellate or otherwise, now imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to merchant vessels or yachts, their measurement, numbers, names, registers, enrollments, licenses, commissions, records, mortgages, bills of sale, transfers, entry, clearance, movements and transportation of their cargoes and passengers, owners, officers, seamen, passengers, fees, inspection, equipment for the better security of life, and by acts of Congress relating to tonnage tax, boilers on steam vessels, the carrying of inflammable, explosive or dangerous cargo on vessels, the use of petroleum or other similar substances to produce motive power and relating to the remission or refund of fines, penalties, forfeitures, exactions or charges incurred for violating any provision of law relating to vessels or seamen or to informer's shares

of such fines, and by acts of Congress relating to the Commissioner and Bureau of Navigation, Shipping Commissioners, their officers and employees, Steamboat-Inspection Service and any of the officials thereof, shall be and hereby are transferred to and imposed and conferred upon the Secretary of Commerce and Labor from and after the time of the transfer of the Bureau of Navigation, the Shipping Commissioners and the Steamboat-Inspection Service to the Department of Commerce and Labor, and shall not thereafter be imposed upon or exercised by the Secretary of the Treasury. And all acts or parts of acts inconsistent with this Act are, so far as inconsistent, hereby repealed."

It is apparent that the penalty in question was, in the language of the act last above quoted, incurred for "violating a provision of law relating to vessels or seamen," and that, therefore, the "duties, power, authority, and jurisdiction" of the Secretary of the Treasury "relating to the remission or refund" of the penalty were "transferred to and imposed and conferred upon the Secretary of Commerce and Labor." The authority vested in the Secretary of the Treasury by section 5294 to "discontinue any prosecution to recover penalties or relating to forfeitures" denounced in laws relating to vessels is not expressly transferred to and conferred upon you by the provisions of the act of February 14, 1903, but "all duties, power, authority and jurisdiction, whether supervisory, appellate or otherwise, now imposed or conferred upon the Secretary of the Treasury, relating to merchant vessels," their "licenses \* \* \* officers, seamen \* \* \* inspection," were transferred to you by the terms of that act. It is my judgment that Congress thereby intended to confer upon you the power, theretofore vested in the Secretary of the Treasury, not only to remit penalties provided for in laws relating to vessels, but to discontinue prosecutions to recover such penalties, upon such terms as you, in your discretion, shall think proper.

That section 5294 applies in the case of a penalty imposed under section 4438 is evident from the fact that it originated as section 64 of an act of February 28, 1871 (16 Stat. 440, 458), which section authorized the Secretary of

the Treasury to "remit or mitigate any fine or penalty provided for *in this act*, or discontinue any prosecution to recover penalties denounced *in this act*," "upon such terms as he, in his discretion, shall think proper," and the provision of section 4438 was taken from section 14 of that same act of 1871 (16 Stat. 440, 446).

In the present case, however, a judgment for the penalty incurred has been entered against Nevins in the district court for the southern district of New York. The question that suggests itself, therefore, is whether Congress, in granting authority to remit a penalty and discontinue a prosecution to recover it, intended to confer upon you power to take such action after a judgment for the penalty had been entered.

In *United States v. Morris*, 10 Wheat. 246, the act under consideration (1 Stat. 506) was in terms similar to the provisions of section 5294. It authorized the Secretary of the Treasury "to mitigate or remit" fines, forfeitures, and penalties in certain cases, "if, in his opinion, the same shall have been incurred without willful negligence, or any intention of fraud on the part of the persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just." Certain property condemned as forfeited in a case covered by the statute had been released under bond and a judgment upon the bond for the appraised value thereof had been entered. The court held that the authority of the Secretary to remit the forfeiture and discontinue the proceedings was not limited to the time of the entry of the judgment of condemnation, and said (p. 291):

"That the act does not, in terms, so limit the power, is very certain; nor is such a construction warranted by the general object and policy of the law, which is intended to provide equitable relief, where the forfeiture has been incurred without willful negligence or intentional fraud. It presupposes, that the offense has been committed, and the forfeiture attached, according to the letter of the law, and

affords relief for inadvertencies and unintentional error. And why should such relief be foreclosed by the condemnation? The law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-house officers. \* \* \* The Secretary is authorized to direct the prosecution to cease and be discontinued. This, undoubtedly, gives him a control over the execution. The suit, or prosecution, does not end with the judgment, but embraces the execution, and it has so been considered by this court at the present term, \* \* \*

In a concurring opinion, Mr. Justice Johnson (p. 297), said:

"I consider the contrary doctrine as neither consistent with the words nor the spirit of the act of 1796. The unavoidable consequence of it would be, that the suitor for grace is shut out of every legal defense; and it would be difficult to assign a reason why justice should be refused by the hand that tenders mercy. Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant. He who supposes his case not to come within the construction of a law, or that the law is repealed, expired, or unconstitutional, can not be visited with moral offense, either in the act charged or the defense of it. Yet, how is the question of right ever to be decided, unless he is permitted to try the question before a court of law? In such a case, pertinacious adherence to his offense can not be imputed to him, since, resisting the suit on the one hand, while he sues for remission on the other, amount to no more than this, that he denies having violated the law; but if the court thinks otherwise, he then petitions for grace, on the ground of unaffected mistake; a point on which, of course, he must satisfy the secretary, before he can obtain a remission. \* \* \* If the question be tested by the technical signification of the terms, in strictness, the power would be confined to cases in which judgment had been obtained, rather than to those of a contrary description. Fines, penalties and disabilities are not incurred, and do not accrue, in the technical sense of the terms, until judgment. \* \* \*

This decision as to the authority of the secretary to remit a forfeiture or penalty subsequent to final judgment was cited with approval in the *Confiscation Cases* (7 Wall. 454, 461), and in *The Laura* (114 U. S. 411, 415).

I concur in the views expressed in the *Morris* case, and advise you that, in my opinion, you are authorized, under section 5294, notwithstanding the entry of the judgment, to remit or mitigate the penalty incurred and discontinue the prosecution upon such terms as you think proper.

As to whether such action may be taken without the payment of costs by the defendant, it should be noted that your authority is to "remit or mitigate" the penalty, and to "discontinue any prosecution." Costs are not, as a general rule, charged against the defendant when proceedings are discontinued by the plaintiff. Moreover, the action you take is to be "upon such terms" as you, in your discretion, shall think proper. Therefore the fact that the payment to be made by the defendant is a sum less than the accrued interest and costs does not, in my opinion, prevent you from proceeding in accordance with the provisions of section 5294.

The nature of the authority conferred by section 3469, to which you also refer, was considered in my opinion of March 30, 1909, to the Secretary of the Treasury (27 Op. 241). Concurring in the views expressed by my predecessors concerning the authority granted by that section, I held that "it does not extend to the compromise of a right to or suit for a penalty imposed as a punishment for the violation of law," but that the authority conferred by it is strictly a fiscal one and "to be exercised upon fiscal considerations alone." It was not decided, however, in that opinion, that a judgment for a fine or penalty can not be compromised under the provisions of section 3469. But, as indicated, the right to compromise such a judgment would depend upon purely fiscal considerations alone. The result would necessarily be to hold that any authority conferred by that section to compromise the judgment in question is vested in the Secretary of the Treasury, since I do not find in the act creating your department or elsewhere a transfer to you of any of his authority with refer-



156 *Purchase of Oil, etc., from Party to Unlawful Trust.*

ence to the compromise and settlement of claims in favor of the Government upon fiscal considerations alone.

You do not inquire concerning the authority of the Secretary of the Treasury under this section, and, moreover, a question as to his authority would not be one arising in your department. Thus it becomes unnecessary to determine whether the judgment in question could be compromised under the authority conferred by section 3469.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

PURCHASE OF OIL AND GASOLINE FROM PARTY TO  
UNLAWFUL TRUST.

A contract for the purchase of oil and gasoline for the Government may be awarded to the Standard Oil Co. of Indiana, notwithstanding that company was adjudicated a party to an unlawful trust and combination since under the decision of the court the company can enter into a valid contract and may be required to execute a bond for the faithful carrying out of said contract.

DEPARTMENT OF JUSTICE,

*June 15, 1911.*

SIR: I have the honor to acknowledge receipt of your communication of May 24, 1911, together with documents accompanying the same, from which it appears that the Standard Oil Co. of Indiana has made the lowest bid for furnishing mineral oil and gasoline to the United States Army, Department of Colorado, for the fiscal year 1912; and you ask whether or not, in view of the judgment of the Supreme Court of the United States recently entered in the case of *United States v. Standard Oil Company of New Jersey et al.*, a legal contract for the furnishing of oil and gasoline can be entered into by the United States with the Standard Oil Co. of Indiana.

In a circular dated December 11, 1909, the Secretary of War directed that, since the Standard Oil Co. of New Jersey and other companies named in the decree of the United States Circuit Court for the Eastern District of Missouri,

entered November 20, 1909, in the above-mentioned case, had been adjudicated parties to an unlawful trust and combination, in violation of the antitrust laws, no purchases on behalf of the Government should be made from such parties, or from any middleman or agent of such parties, when known that such middleman or agent was acting for such unlawful concern.

In an opinion transmitted to your department on March 17, 1910, it was held that where a bidder was a bona fide owner of oil purchased from one of the companies embraced in the decree against the Standard Oil Co. and others, the fact of the previous ownership of the oil by one of the companies mentioned in the order did not constitute a valid reason for refusing to award the contract to such bidder. (28 Op. 218, 221.) And, in reply on March 23, 1910, to another communication with reference to the same matter, the view expressed in the former opinion was extended to embrace any parties who should satisfactorily show to your department that they had acquired, bona fide and in their own right, either for immediate possession *or for future delivery*, the supply which they agreed to sell and deliver to the Government.

On April 19, 1910, another opinion was transmitted to your department upon the following state of facts:

On June 25, 1906 (34 Stat. 835), Congress passed a joint resolution which provided that purchase of equipment and material for use in the construction of the Panama Canal should be restricted to articles of domestic manufacture and production, from the lowest responsible bidder, unless the President should in any case deem the bids or tenders therefor to be extortionate or unreasonable; and on January 6, 1908, the President issued an Executive order applying to the Isthmian Canal Commission which provided that contracts should be made only after due public advertisement in newspapers of general circulation, and should be awarded to the lowest responsible bidder except in case of emergency, when, with the approval of the Secretary of War, advertisement might be dispensed with. The question as stated in the opinion was:

“Whether or not a person or corporation who offers to sell to the Government, pursuant to public invitation to bid, material and equipment for use in the construction of the Panama Canal, and who is otherwise responsible and able to carry out his contract, may be deemed to be not a “responsible bidder” because he is a party to an unlawful trust or monopoly, or otherwise carrying on his business in violation of the Sherman Antitrust Law.”

And it was held that, under the statute and Executive order, a contract for the purchase of material and equipment for use in the construction of the Panama Canal could not be ignored simply because such bidder had been adjudicated to be a party to an unlawful trust or monopoly. (28 Op. 247.)

This opinion was rested upon the decision of the Supreme Court of the United States in *Connolly v. Union Sewer Pipe Co.* (184 U. S. 540, 550), wherein the defendant in error had brought suit to recover an amount due by notes for sewer pipe sold and delivered to plaintiff in error; and it was set up as a defense that the plaintiff was a member of an illegal combination among manufacturers of sewer and drainage pipes, formed for the purpose of enhancing prices, stifling competition, and restricting the freedom of commerce between the States and with foreign countries, contrary to the common law and the Sherman Antitrust Act. But it was held by the Supreme Court that such fact did not constitute a valid defense, because, though the company may have been a party to an illegal combination, yet the transaction in question did not grow out of such combination, and was not within itself unlawful, and hence was enforceable. That part of the opinion which bears directly upon the present question is as follows:

“If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such com-

bination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.”

On June 14, 1910, a communication was received from your department in which you stated that the Vacuum Oil Co., one of the companies specified in the decree above named, had requested a suspension of the order of December 11, 1909, pending the ultimate decree of the Supreme Court; and you asked for an opinion as to whether or not an adjudication that a person or corporation is a party to an unlawful trust or monopoly, from which judgment an appeal has been taken, is sufficient to exclude such person or corporation from competition in the sale of supplies to the Government; and in response thereto (28 Op. 384) it was held that such adjudication did not justify a rejection of a bid from such party; but, it was suggested that, inasmuch as an appeal had been taken from the judgment of the circuit court, it was not necessary “to express an opinion upon what the status of the company would be if a final decree affirming the decree of the court below were rendered, and in defiance of such decree the company persisted in the transaction of business.”

Unless there has been some material modification of the status of the parties defendant to that litigation by the decree entered by the Supreme Court, it is apparent that the foregoing opinions are conclusive of the question now presented. It is necessary, therefore, to examine the nature of the decree pronounced in the circuit court against the party in question, and the effect of the affirmance thereof, with certain modifications, by the Supreme Court.

As to the Standard Oil Co. of Indiana, it was adjudged and decreed by the circuit court, in effect, that it had entered into and become a party to a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several States and in the Territories and with foreign nations, such as is declared illegal by the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" and by means of this combination the several defendants had combined and conspired to monopolize, and had monopolized, and were continuing to monopolize, a substantial part of the commerce among the States, in the Territories, and with foreign countries; that the capital stock of the Standard Oil Co. of Indiana was \$1,000,000, of which the Standard Oil Co. of New Jersey owned \$999,000, by which means the former company was controlled by the latter; that the various companies mentioned were engaged in shipping petroleum and its products into the States and Territories of the United States, the District of Columbia, and foreign nations; and the subsidiary companies, of which the Standard Oil Co. of Indiana was one, were controlled by the Standard Oil Co. of New Jersey; that the stock of the Standard Oil Co. of Indiana was acquired and held by the Standard Oil Co. of New Jersey by virtue of the illegal combination; and the court enjoined the Standard Oil Co. of New Jersey, or anyone acting for it, from voting any of the stock of the Standard Oil Co. of Indiana, and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of the same by virtue of its holding of said stock; and the Standard Oil Co. of Indiana and its officers, agents, and employees were enjoined from declaring or

paying any dividends to the Standard Oil Co. of New Jersey on account of its stock held by such company, and from permitting said company to vote any of its stock or to direct its policy or to exercise any control whatsoever over its corporate acts; but it was not prohibited from distributing ratably to the shareholders of the Standard Oil Co. of New Jersey the shares of its stock to which they were equitably entitled. The Standard Oil Co. of Indiana and its officers, etc., were further enjoined from continuing or carrying into further effect the combination adjudged illegal, and from entering into or forming any like combination or conspiracy the effect of which would be to restrain commerce in petroleum or its products among the States and in the Territories of the United States and with foreign countries; or to prolong the unlawful monopoly of such commerce, either by written evidence or stock interest, through any competitive party to the illegal combination, by causing the conveyance of its property and business to such party, by placing its control in a trustee or group of trustees, by causing its stock to be held by others than its equitable owners, or any similar device, or by making any kind of contract with either or any of the parties defendant relative to its control or management, or the price or terms of purchase, or the sale, or rates of transportation of petroleum or the products thereof, in interstate commerce.

By the seventh section of the decree it was ordered that the defendants named in section 2 (of which the Standard Oil Co. of Indiana was one) be enjoined and prohibited, until the discontinuance of the operation of the illegal combination, from engaging or continuing in commerce among the States, or in the Territories of the United States; and by the ninth section it was directed that the decree should take effect 30 days after it was entered, in case of no appeal being taken therefrom; but in case of an appeal that it should take effect 30 days after the final judgment of the Supreme Court.

This decree was in all things affirmed by the Supreme Court, except the last provision was modified by extending the time in which it should go into effect to six months,

and the injunction against engaging in interstate commerce, directed by section 7 of the decree of the court below, was held to have been improvidently granted.

It is apparent that the legal status of the Standard Oil Co. of Indiana has been changed in no respect by the pronouncement of the decree by the Supreme Court. There is no adjudication that the Standard Oil Co. of Indiana is not a lawfully incorporated body. On the contrary, there is a distinct recognition that its existence is lawful and that its illegal act consists in the combination which was effected by the ownership of its stock by the Standard Oil Co. of New Jersey; and, further, the Supreme Court has expressly refused to enjoin its engaging in interstate commerce for a period of six months, and has extended the period of probation as to it and all other defendants for a like period, to permit them to dissolve the unlawful combination by the proper adjustment of the stock relationship, the method of doing which is suggested in the opinion of the court.

Under the opinion rendered April 19, 1910, and the decision of the Supreme Court of the United States in the case of *Connolly v. Sewer Pipe Company* (184 U. S. 540), there is no question that contracts entered into by this company are perfectly valid and enforceable. If this company and the Standard Oil Co. of New Jersey, after the expiration of six months, should, through its officers and directors, refuse to obey the mandate of the court and dissolve their relationship in accordance with its terms, the circuit court might thereafter enjoin its further engaging in interstate commerce, and possibly might place it in the hands of a receiver, and direct that its business be wound up; but, in such case, the interests of the United States would be amply protected by the act of April 10, 1878, chapter 58 (20 Stat. 36), as amended by the act of March 3, 1883, chapter 120 (22 Stat. 487), wherein it is provided:

“That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department \* \* \* And he may re-

quire every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required."

The provision of law under which these contracts are made by your department is contained in the act of April 23, 1904, chapter 1485 (33 Stat. 268), which reads as follows:

"That hereafter, except in cases of emergency, or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; but every open market emergency purchase made in the manner common among business men, which exceeds in amount \$200 shall be reported for approval to the Secretary of War under such regulations as he may prescribe."

Other statutes and rules of your department relating to this question are cited and some of them quoted in the opinion of July 25, 1910.

Manifestly it was the purpose of Congress under these provisions to require the War Department to consider the purchase of its supplies from purely a business standpoint. While the expression which occurs in the opinion of July 25, 1910—

"The phrase 'the interest of the Government considered' does not enlarge the authority of the contracting officer, but has reference to the cost and adaptability of the supplies for the uses of the Government," (28 Op. 389), may be somewhat narrow, yet the purpose of Congress was to confine the discretion of your department to a consideration of the financial interests of the Government, which



embraces the responsibility of the parties, and every matter which tends to show whether the acceptance of the lowest bid would be financially profitable to the United States; and, as the Standard Oil Co. of Indiana can, under the decision of the Supreme Court, enter into a valid contract for the delivery of oil, and may be required to execute a bond for the faithful carrying out of such contract, the fact that it is a party defendant in the case of *United States v. Standard Oil Company of New Jersey et al.*, and that a final decree of the character above described has been entered against it therein, does not of itself justify you in rejecting its bid.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

#### MANILA RAILROAD CO.—CORPORATION TAX.

The Manila Railroad Co., a corporation organized under the laws of New Jersey, and doing business wholly within the Philippine Islands, and operating under a concessionary contract granted by the Philippine Legislature, is liable to the Federal excise tax on corporations, imposed under section 38 of the act of Congress approved August 5, 1909 (36 Stat. 112).

The fact that the company is aided in its business by the Philippine Government can not of itself exempt it from the burdens of taxation imposed by the Government of the United States.

DEPARTMENT OF JUSTICE,

June 24, 1911.

SIR: I have yours of the 20th instant asking the opinion of the Attorney General upon the question "whether the Manila Railroad Co., a corporation organized under the laws of New Jersey, and doing business wholly within the Philippine Islands, and operating under a concessionary contract granted by the Philippine Legislature, is liable to the Federal excise tax on corporations, imposed under section 38 of the act of Congress approved August 5, 1909." (36 Stat. 112).

Section 38, to which you refer, provides:

"That every corporation, joint stock company or association, organized for profit and having a capital stock

represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company."

This clause of the section clearly includes the Manila Railroad Co. unless the limitation, "engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia," applies to the domestic as well as to the foreign corporations described in the act.

Domestic corporations as such, by reason of their mere existence, are subject to the jurisdiction and authority of the United States; foreign corporations are subject to such jurisdiction and authority only as they operate within the United States. The tax imposed by the act is laid accordingly. In the case of the domestic corporation it is "upon the entire net income over and above \$5,000 received by it *from all sources*," etc.; while in the case of the foreign corporation it is "upon the amount of net income over and above \$5,000 received by it *from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia*," etc.

In the case of the foreign corporation there is a territorial limitation upon the measure of the tax, while as to the domestic corporation there is none.

A domestic corporation doing business in the United States and also abroad is taxable upon its entire net income regardless of the proportion which the income from business done abroad bears to the income from business done at home. The measure of the tax not being limited to income from business done at home, it must be held to apply in the case of the domestic company, all of whose income is derived from business done abroad, unless there is express exception of such a company made in the act itself, and no such exception is found therein.

So far as concerns the question here involved, business done in the Philippine Islands stands upon the same footing with business done in foreign countries, for the internal revenue laws of the United States have not been made applicable to those islands.

Income from business done in the islands by a domestic corporation described in the act is subject to the tax not because the act is operative in the islands, but because it is operative upon the corporation and extends to its "entire net income \* \* \* received by it from all sources."

A corporation created by the Philippine Government is not within the act at all, because it is not "organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia," and neither is it "organized under the laws of any foreign country."

The Philippine Islands are not a foreign country, and at the same time the laws of the United States, except as expressly extended to them, are not their laws. Section 1 of the organic act of the islands, approved July 1, 1902 (32 Stat. 691), prescribes that "the provisions of section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands." The section thus referred to is as follows:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

A corporation "organized under the laws of any foreign country" is not subject to the income tax with respect to its business done in the Philippine Islands because the measure of the tax, as to it, prescribed by the act, is "the amount of net income \* \* \* received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia." The word "Territories, as here used, is clearly applicable only to Arizona, New Mexico, and Hawaii.

The resulting discrimination against American, and in favor of foreign, corporations as to business carried on in the Philippines and in Porto Rico can not serve to alter the construction of the act, although it may invite to amendment.

Counsel for the Manila Railroad Co., Mr. John G. Milburn, concurs in the view here expressed, stating in his memorandum that "the Manila Railroad Co. is organized under the laws of the State of New Jersey; it has a capital stock represented by shares, and it is organized for profit. It would seem, therefore, to be within the descriptive terms of the act."

Mr. Milburn, however, expresses the opinion that, because of the relations of the company to the Philippine Government, it is exempt from the tax. He says:

"The essential facts are: (1) That the concessionary contracts made under the authority of Congress prescribe the payment annually of a percentage of the gross earnings of the company in exoneration of all taxation; and (2) that the exaction of this additional tax impairs to the extent of its amount the fund applicable to the payment of interest on bonds, which is an obligation of the Government of the Philippine Islands to the extent that it is not paid by the company. I feel that the authorities would be warranted in construing the act not to apply to such a corporation, for the reason that it is exempt from taxation if it pays annually the fixed percentage of its gross earnings; and for the further reason that to do otherwise would make it in substance and effect the imposition of a burden upon the Philippine Government."

In this view I do not concur.

Section 74 of the act of July 1, 1902, providing for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, authorizes concessions for the construction and operation of works of public utility, and for the payment of a reasonable percentage of the gross earnings of such public utility "into the treasury of the Philippine Islands or of the province or municipality within which such franchises are granted and exercised." It does not provide, however, that such pay-

ment of a percentage of gross earnings shall preclude the Government of the United States from imposing a tax upon any corporation of the United States, or of any State, which may construct and operate such utility. The concession granted by the Philippine Government to the company in 1906 provides in subdivision 12 for the payment by the company annually of a fixed percentage of its gross earnings to the Philippine Government, and that such payments, "when promptly and fully made by the grantee shall be in lieu of all taxes of every name and nature—*municipal, provincial, or central*—upon its capital stock, franchises, right of way, earnings, and all other property owned or operated by the grantee under this concession or franchise." But the taxes here referred to as municipal, provincial, or central are taxes which might be imposed by authority of the Philippine Government, and have no reference to a tax imposed directly by authority of the United States for the purposes of its own revenues. And if the grant by the Philippine Government to the company assumed to exempt it in any wise from its obligations to the United States it would be to that extent inoperative.

Neither does the fact that the Philippine Government has guaranteed the payment of the interest upon the bonds issued by the company exempt the company from taxation.

Among the corporation tax cases recently decided by the Supreme Court was that of the Interborough Rapid Transit Co. The street railway, in that case, operated by the defendant company, was owned by the city of New York, but this was held not to exempt the business of the company from the tax. The court cited with approval *South Carolina v. United States* (199 U. S. 437), in which it was held that "when a State, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States."

The company, as Mr. Milburn agrees, is within the terms of the corporation tax law. The business in which it is engaged is within the terms of the law, as was expressly held in the corporation tax cases. That the company is

aided in its business by the Philippine Government can not of itself exempt it from the burdens imposed by the Government of the United States.

The question you ask must be answered in the affirmative.

Respectfully, yours,

F. W. LEHMANN,  
*Solicitor General.*

The SECRETARY OF WAR.

---

REMISSION OF PENALTY IMPOSED UPON VESSEL CLEARING  
FOREIGN PORT AND ENTERING PORT OF UNITED STATES  
WITHOUT BILL OF HEALTH.

The Secretary of Commerce and Labor has no authority to remit or mitigate a penalty or forfeiture imposed upon a vessel for a violation of section 2 of the act of February 15, 1893 (27 Stat. 450), which requires a vessel to obtain a bill of health before clearing any foreign port for a port in the United States, as that matter still remains within administrative jurisdiction and control of the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,  
*June 27, 1911.*

SIR: I beg to respond to your request of the 12th instant for my opinion as to whether, under section 5292 or section 5294 of the Revised Statutes, or any other provisions of law, you are authorized to remit or mitigate a penalty or forfeiture of \$250 imposed by the District Court of the United States for the Southern District of California upon the British steamship *Beckenham* for a violation of section 2 of the act approved February 15, 1893 (27 Stat. 449, 450), which provides—

“SEC. 2. That any vessel at any foreign port clearing for any port or place in the United States shall be required to obtain from the consul, vice-consul, or other consular officer of the United States at the port of departure, or from the medical officer where such officer has been detailed by the President for that purpose, a bill of health, in duplicate, in the form prescribed by the Secretary of the Treasury, setting forth the sanitary history and condition of said vessel, and that it has in all respects complied with the rules and regulations in such cases prescribed for

170 *Vessels—Remission of Penalty—Bill of Health.*

securing the best sanitary condition of the said vessel, its cargo, passengers, and crew; \* \* \*

“The President, in his discretion, is authorized to detail any medical officer of the Government to serve in the office of the consul at any foreign port for the purpose of furnishing information and making the inspection and giving the bills of health hereinbefore mentioned. Any vessel clearing and sailing from any such port without such bill of health, and entering any port of the United States, shall forfeit to the United States not more than five thousand dollars, the amount to be determined by the court, which shall be a lien on the same, to be recovered by proceedings in the proper district court of the United States. \* \* \*”

Section 5292 of the Revised Statutes, as amended by the act of February 27, 1877 (19 Stat. 240, 252), reads as follows:

“SEC. 5292. Whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and for regulating the same, or providing for the suppression of insurrections or unlawful combinations against the United States, shall prefer his petition to the judge of the district in which such fine, penalty, or forfeiture, or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the judge shall inquire, in a summary manner, into the circumstances of the case; first causing reasonable notice to be given to the person claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts appearing upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury. The Secretary shall thereupon have power to mitigate

or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same was incurred without willful negligence, or any intention of fraud in the person incurring the same; and to direct the prosecution, if any has been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just."

Section 5294, as amended by the act of December 15, 1894 (28 Stat. 595) and the act of March 2, 1896 (29 Stat. 39), is as follows:

"SEC. 5294. The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels, or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

The act of February 14, 1903 (32 Stat. 825, 829), to establish the Department of Commerce and Labor, provides, section 10, that—

"All duties, power, authority and jurisdiction, whether supervisory, appellate or otherwise, now imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to merchant vessels or yachts, their measurement, numbers, names, registers, enrollments, licenses, commissions, records, mortgages, bills of sale, transfers, entry, clearance, movements and transportation of their cargoes and passengers, owners, officers, seamen, passengers, fees, inspection, equipment for the better security of life, and by acts of Congress relating to tonnage tax, boilers on steam vessels, the carrying of inflam-



mable, explosive, or dangerous cargo on vessels, the use of petroleum or other similar substances to produce motive power and relating to the remission or refund of fines, penalties, forfeitures, exactions or charges incurred for violating any provision of law relating to vessels or seamen or to informer's shares of such fines, and by acts of Congress relating to the Commissioner and Bureau of Navigation, Shipping Commissioners, their officers and employees, Steamboat-Inspection Service, and any of the officials thereof, shall be and hereby are transferred to and imposed and conferred upon the Secretary of Commerce and Labor from and after the time of the transfer of the Bureau of Navigation, the Shipping Commissioners, and the Steamboat-Inspection Service to the Department of Commerce and Labor, and shall not thereafter be imposed upon or exercised by the Secretary of the Treasury. And all acts or parts of acts inconsistent with this act are, so far as inconsistent, hereby repealed."

The act of February 15, 1893 (27 Stat. 449), under which the penalty or forfeiture was imposed upon the steamship *Beckenham*, is entitled "An act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service," now known as the Public Health and Marine-Hospital Service (act of July 1, 1902, 32 Stat. 712), which, it will be observed, has not been transferred to the Department of Commerce and Labor, but still remains, as formerly, under the jurisdiction of the Secretary of the Treasury (sec. 4862, Revised Statutes). The rules for the sanitary condition of the vessel, a compliance with which is to be set forth in the bill of health, are prescribed by the Secretary of the Treasury under the provisions of the act of February 15, 1893 (secs. 2, 3, and 5).

In my judgment Congress did not, by the provisions of the act creating your department, intend to transfer to you the authority to remit or mitigate a penalty or forfeiture, such as that in question, incurred for a violation of a statute concerning a matter which remains within the administrative jurisdiction and control of the Secretary of the Treasury. It is true that by the terms of that act the duties of the Secretary of the Treasury "relating to the

remission or refund of fines, penalties, forfeitures \* \* \* incurred for violating any provision of law relating to vessels" are transferred to and conferred upon you, but it should be noted that such transfer is to take effect "from and after the time of the transfer" of the bureaus and offices which are therein expressly transferred to your department. As above stated, the Public Health and Marine-Hospital Service is not so transferred. Considering the various provisions of the act in relation to each other, and applying the well-known rule that a particular case may be within the letter of the statute and yet not within the intention of the lawmaker, it is my opinion that authority to remit this penalty or forfeiture has not been conferred upon you, and you are so advised.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.

---

CONSTRUCTION OF NEW LOCK AND DAM AT TROY, N. Y.

The appropriation in the river and harbor act of June 25, 1910 (36 Stat. 635), for improving the Hudson River, which contemplated the construction of a new lock and dam in the vicinity of Troy and the removal of the State dam, was conditioned upon the extinguishment by the State of all existing power rights or privileges affected by the improvement, and after the existing power rights and privileges in question had been extinguished by the State canal board it was beyond the power of the State to interfere with the improvement authorized, in view of the paramount control of Congress over the Hudson River as a navigable waterway of the United States.

DEPARTMENT OF JUSTICE,

*July 3, 1911.*

SIR: The river and harbor act, approved June 25, 1910 (36 Stat. 635-636), contains the following provision:

"Improving Hudson River, New York: For maintenance and continuing improvement in accordance with the report submitted in House Document Numbered Seven hundred and nineteen, Sixty-first Congress, second session, and with a view to completing said improvement within a period of four years, one million three hundred and fifty

thousand dollars: *Provided*, That the expenditure of the amounts herein and hereafter appropriated for said improvement shall be subject to the conditions set forth in said document: *Provided further*, That the general plan for the improvement presented in said document shall be subject to such modification as to the location of the dam and in matters of detail as may be recommended by the Chief of Engineers and approved by the Secretary of War."

In your letter of May 25, 1911, referring to the report of the engineer officers of the War Department embodied in House Document No. 719, you say:

"The plan submitted in said report contemplated the construction of a new lock and dam in the vicinity of Troy, N. Y., about 1,400 feet north of the State dam, the removal of said State dam, and the continuation of the channel from deep water in the lower river through said State dam to Waterford, it being stated in said report that 'it is advisable for the General Government to undertake the improvement of the Hudson River from deep water up to Waterford, *provided all existing power rights or privileges affected by the improvement are extinguished by the State of New York*,' etc.

"After the passage of the act, when it became apparent that the prosecution of the work would be facilitated by the immediate abandonment of the State lock and dam, the matter was brought to the attention of the governor of New York by War Department indorsement of August 5, 1910, on Engineer Department letter of August 4, 1910. In response to this communication the State canal board, at a meeting held on November 22, 1910, passed a resolution formally abandoning the State lock and dam and authorizing their destruction—this abandonment being understood to include the extinguishment of the existing power rights and privileges connected with said dam. Subsequent to the passage of this resolution the State board of public works transmitted to the Secretary of War a copy of the same and advised him that possession might be taken of the structures at any time, *and that the water rights at either end of the dam had been canceled*. Thereupon the Engineer Department proceeded with the necessary

preliminary operations, involving the expenditure of considerable sums of money, and entered into a contract for dredging and rock excavation covering nearly \$300,000 worth of work, to be commenced during the present month.

"After these expenditures and the execution of said contract, the governor of New York presented a resolution of the State canal board, approved April 28, 1911, rescinding the aforesaid resolution of November 22, 1910, abandoning the lock and dam—indicating an intention to retain the control of these structures and requesting the War Department to amend the adopted project for the improvement of the river.

"As a result of this attitude on the part of the State authorities, a conference was held in Albany on May 9, 1911, with the governor, the attorney general, and the State engineer of the State of New York, at which Col. W. M. Black, the local engineer officer, who represented the United States at the conference, was requested to submit, for the views of the War Department, certain questions, which are substantially the first three questions hereinafter submitted for your opinion. If the expenditure of the entire appropriation is conditioned upon the consent of the State to the destruction of the State dam and the extinguishment of the power rights now existing at said dam, it will appear that the withdrawal of the consent heretofore given, if operative, places the War Department in an embarrassing position, since considerable expenditures have been made and a contract let on the faith of such consent."

Upon this state of facts you request my opinion on the following questions:

"(1) Whether the portion of the appropriation made by the act of June 25, 1910, which is to be expended otherwise than in the construction of the proposed lock and dam, may be expended without the consent of the State of New York to the removal of the present dam.

"(2) Whether any portion of the appropriation is available for expenditure without the extinction of the power rights now existing at said dam and referred to in the report mentioned in the appropriation.

“(3) Whether, if the United States should build the proposed dam, as authorized by the act of Congress, and thereby create water power, the water power so created belongs to the United States.

“(4) Whether, in view of the fact that the State gave its consent to the abandonment and destruction of the State dam at Troy, by resolution of the State canal board of November 22, 1910, and provided, it is understood, for the extinction of the water rights connected therewith, together with the fact that the United States has proceeded on the faith of such action on the part of the State authorities with the work of the improvement, it would be competent for the State authorities to rescind such action, or whether the resolution of April 28, 1911, should not be regarded as inoperative to accomplish its purpose.”

It appears from House Document No. 719 that the Federal Government has for some years past been engaged in deepening and widening the channel of the Hudson River in this vicinity, several million dollars having already been expended for the work under appropriations by Congress, and that the work authorized by the act of June 25, 1910, is in the nature of an enlargement of the former project, which did not, however, include the removal of the present State dam and the construction of a new dam. It also appears from such reports that the present plan contemplates a further deepening of the channel of the river beyond that authorized by the former project.

In the report of the Chief of Engineers embodied in House Document No. 719, it is said:

“The plan submitted contemplates the construction of a new lock and dam in the vicinity of Troy about 1,400 feet north of the existing State lock and dam, which will be removed, and the excavation of a channel from deep water in the lower river to Waterford 12 feet deep at all stages. Below Troy the general width of the channel is to be 400 feet, except at Albany, where it widens into a basin. In the vicinity of Troy the width above the dam is to be 200 feet, widening into a basin just below the dam. For a short distance below this basin there will be a double channel, one on either side of Adams Island, with widths,

respectively, of 150 and 200 feet. Between the Delaware and the Hudson and Congress Street Bridges the width is to be 500 feet, below which it narrows to the proposed general width of 400 feet.

"This work will extend nearly as far south as Hudson, and includes dredging, rock excavation, construction of a lock, dam, and mooring piers, and removal of the old lock and dam, all at an estimated cost of \$5,186,064. The district officer considers the improvement worthy of being undertaken by the United States, and states that if the project is approved and work authorized provision should be made for executing it under the continuing contract system, the amount required for the lock and dam to be provided by a cash appropriation of \$300,000, and the balance to be made available within two years in order to insure completion within three working seasons. An initial appropriation of \$1,000,000 is required for the work below the dam.

"These reports have been considered by the Board of Engineers for Rivers and Harbors, and in its opinion it is advisable for the General Government to undertake the improvement of the Hudson River from deep water up to Waterford, *provided all existing water-power rights or privileges affected by the improvement are extinguished by the State of New York*, it being understood, however, that both plans and estimates are general in character and require further careful study, particularly with reference to the low-water plane and its bearing upon the elevation of the lower sill of the lock. The board further states that the cost of maintenance of this improvement will probably not be excessive.

"If it be the policy of Congress to make the connection of the navigable channel of the Hudson River with the State canal by extending the former channel through and above the State dam at Troy, and by the construction of a new lock and dam, I agree with the district officer, who is also division engineer, and with the Board of Engineers for Rivers and Harbors that Hudson River is worthy of improvement in this connection at the cost specified.

\* \* \* \* \*

"The district officer has been informed by the canal board that it is ready to abandon the present lock and dam as soon as new structures are constructed by the United States, and that the project submitted meets with the approval of the advisory board of canal engineers."

In the report of Col. W. M. Black, of the Corps of Engineers, also embodied in said House document, it is said:

"Certain manufacturing establishments on the east and west banks of the river are now using power developed by the dam under leases obtained from the State of New York. The lease for the east side was obtained in 1832. It may be summarized as follows:

"The lease is for the use of one-half of '\* \* \* the surplus waters created by the erection of the State dam in the Hudson River \* \* \* for the term of nine hundred and ninety years.'

"The lessees are to pay to the State—

"\$50 for the first year, with an increase of \$50 a year for every year thereafter until it amounts to the sum of \$300 a year, and then to continue at the said sum of \$300 a year for the remainder of said term.

"The conditions of the lease stipulate that the lessees may have—

"\* \* \* the use of the surplus water which may be taken at the east end of the aforesaid dam, and not exceeding one-half of the quantity which may be taken at both ends of said dam, such surplus water to be taken and drawn from the said dam at such place and in such manner, and be discharged at such place and in such manner, as the acting canal commissioner or the canal commissioners shall from time to time direct; saving and reserving to the said parties of the first part the right wholly to resume the waters hereby conveyed and the privileges hereby granted, and to control and limit the use of said water and privileges whenever, in the opinion of the canal board or of the legislature, the necessary supply of water for use of any State canal, or the safety of such canal, or works connected therewith, shall render such resumption, control, or limitation necessary. And in case any such resumption shall be made, or control or limitation imposed, no compensation

or damages shall be allowed for any improvements or erections made, or which may be made under or in consequence of this grant or lease. And also saving and reserving to the said parties of the first part the right, without making any compensation to the said parties of the second part, or any other person claiming under them, wholly to abandon or destroy the work, by the construction of which the said surplus water has been created, whenever, in the opinion of the canal commissioners, the occupation and use of the said work shall cease to be advantageous to the State."

"The lease granted for water for the west bank was made in 1835 for the same term of years and in similar form with similar provisions.

"Under these leases certain manufacturing establishments on the east bank have been using about 1,740 horsepower per year and those on the west bank about 190 horsepower. The State authorities have permitted these establishments to raise the crest of the dam by flashboards and to store water by night for use during the day, causing fluctuations in the pool level during the season of lowest water, which might be inadmissible when the new barge canals are in full operation. It is probable that when the new dam is built there will be surplus water sufficient to develop at least 1,400 horsepower, which should be utilized. A small portion of this can be used for operating and lighting the lock; the remainder can be sold.

"It will be noted that the abandonment of the existing structure by the State extinguishes these leases automatically. The legal successors of the canal commissioners are the canal board. I am informed that this body is ready to abandon the dam as soon as the United States has constructed a new lock and dam. The proposed change in location of the dam would not prevent the continued use of the surplus water for obtaining power by these establishments, for a flume can be constructed to supply it. New and mutually advantageous arrangements can be made, if desired, with the owners of these establishments for this purpose, or, since the removal of the site makes it possible to locate other new establishments in a position



which would make it possible to utilize the power, with other parties. In other words, the change in location of the dam would not destroy any vested rights for the use of the power developed, nor would such removal prevent the present users from continuing its use. It would, however, place the Government in a position to obtain an adequate return for such power. Time has not permitted an estimate of cost of a new flume to be made.

\* \* \* \* \*

"To recapitulate, attention is again invited to the fact that this report is submitted on account of the urgent need of beginning work at and near the State dam in order that the barge canal commerce may have access to the river as soon as the canals are opened. The detailed project has not yet been completed for the reason that its formation was not directed by Congress until March, 1909, and the fieldwork could not be completed until the end of November. Much study is yet required before definite recommendations can be made as to the details of the work. The estimates are approximate only, but are believed to be sufficient to cover the work required.

"These estimates are as follows:

|                                                                          |           |
|--------------------------------------------------------------------------|-----------|
| Channel from Waterford to dam.....                                       | \$44,000  |
| Lock, dam, and piers.....                                                | 547,100   |
| Clearing river bed immediately below dam.....                            | 106,250   |
| Removal of old lock and dam.....                                         | 79,407    |
| Basin below lock.....                                                    | 239,270   |
| Improvement between head of Adams Island and head of Breaker Island..... | 1,328,882 |
| Improvement from head of Breaker Island to deep water at Hudson.....     | 2,369,695 |
| Total.....                                                               | 4,714,604 |
| Engineering and contingencies, 10 per cent.....                          | 471,460   |
| Grand total.....                                                         | 5,186,064 |

"Of the above, the estimated cost of the work properly chargeable to the harbor of Troy is \$420,559; that for the harbor at Albany is \$105,000.

"The cost of the work estimated for Coeymans, amounting to \$9,200, is not included in the above figures.

"If this project is approved and the work authorized, provision should be made for executing the work under continuing contracts. Unless the dredging and rock excavation can be carried on under a large contract, it is probable that work of that character above and below the dam can be done most advantageously separately, as separate plants would have to be provided on account of the difficulty of passing the sloop lock. It is important that the work in the lock and dam should be started at the earliest practicable date, and that the connecting channel between the new lock and the existing channel below should be started in time to permit its completion immediately after the new lock and dam are built, in order that the commerce through the canals may be stopped for as short a time as practicable. The sum which can be expended advantageously in the coming year under a continuing contract for the construction of a lock and dam is \$300,000. The entire sum should be made available within two years in order that the work can be completed within three working seasons.

"In the work below the dam \$1,000,000 can be expended advantageously in the next working season. The money should be made available for the improvement of the Hudson between Waterford and New York Harbor."

It seems clear that the ultimate extinguishment by the State of New York of all existing water-power rights or privileges affected by the improvement in question, through the abandonment of the said dam or otherwise, was one of the conditions referred to by Congress in appropriating for the work in question, and I understand you have so construed the act.

The resolution of the canal board of November 22, 1910, in regard to the cancellation of existing water rights and the abandonment of said dam and lock, as appears from the certified copy thereof transmitted by you, reads as follows:

"Whereas, by the provisions of chapter 147 of the laws of 1903, and the acts amendatory thereof and supplemental thereto, the State has directed the improvement of that portion of the canal system of the State which lies in the

thread of the Hudson River from Congress Street, in the city of Troy, to Waterford, and

"Whereas in the carrying out of that improvement so directed by the legislature, it now is apparent that the existing State dam and lock at Troy must be destroyed, and

"Whereas on the 2d day of January, 1832, and on the 26th day of November, 1835, the people of the State of New York, by the then canal commissioners, executed two leases, the first to the Lansingburgh Dry Dock & Hydraulic Co. and the second to one George Tibbitts, whereby there was conveyed to said parties all of the surplus water created by the said Troy dam and lock, and

"Whereas in both of said leases certain rights and privileges were reserved to the State by the following clause, incorporated in both instruments:

"[Here follows the clause quoted in the report of Col. Black, of the Corps of Engineers, above set forth, beginning with the words 'saving and reserving.']

"and

"Whereas the Honorable Frederick C. Stevens, superintendent of public works, as successor to the said canal commissioners, has this day notified this board that in his opinion the occupation and use of the structures by whose maintenance the surplus water conveyed by said leases has been created, have ceased to be advantageous to the State, and by virtue of the authority and power reserved to him, as successor to the canal commissioners, has recommended that the said structures be wholly abandoned and that their destruction be authorized and approved; now be it

"*Resolved*, That it is the opinion of this board that the whole of the surplus water created by said dam and lock is now necessary for the use of the canals of the State and the works connected therewith, authorized and directed by said chapter 147 of the laws of 1903, and the acts amendatory thereof and supplemental thereto, and that the said surplus water be and the same hereby is wholly resumed.

"*And be it further resolved*, That the said dam and lock, by the construction of which the said surplus water has been created, be and the same hereby are abandoned, and the destruction thereof be and the same is hereby authorized.

*"And be it further resolved,* That the superintendent of public works be and he hereby is directed to serve a copy of this resolution upon the said lessees, their successors or assigns."

It further appears from affidavits transmitted that copies of this resolution were served upon the lessees, their successors or assigns, as directed therein.

As stated in your letter, "subsequent to the passage of this resolution the State Board of Public Works transmitted to the Secretary of War a copy of the same and advised him that possession might be taken of the structures at any time, and that the water rights at either end of the dam had been canceled. Thereupon the Engineer Department proceeded with the necessary preliminary operations, involving the expenditure of considerable sums of money, and entered into a contract for dredging and rock excavation covering nearly \$300,000 worth of work, to be commenced during the present month."

In my opinion the State canal board, assuming that the existing water-power rights or privileges in question had been properly extinguished by the proceedings indicated in its resolution of November 22, 1910, could not by attempting to rescind such action after it had been accepted and acted upon by the Federal Government, as stated by you, prevent the act of Congress authorizing the improvement of the river from becoming operative. The conditions specified in the act of Congress as to the extinguishment of such rights or privileges having been met, it was beyond the power of the State thereafter to interfere with the improvement authorized, in view of the paramount control of Congress over the Hudson River as a navigable waterway of the United States.

It is to be observed that the action of the canal board purports to have been taken pursuant to chapter 147 of the laws of the State as amended, directing the improvement of that portion of the State canal system which lies in the thread of the Hudson River from Congress Street in the city of Troy to Waterford (1 Consolidated Laws of New York, pp. 521, et seq.), and which, it is understood, includes the portion of the river covered by the congressional improvement.

The Chief of Engineers in his report to the Secretary of War of January 15, 1907, in regard to the extension of the then existing project for the improvement of the Hudson River to Waterford, said (H. Doc. No. 539, 59th Cong., 2d sess.):

"Hudson River is at present being improved by the United States under a project which provides for securing a channel depth of 12 feet up to the State dam at Troy. In connection with this dam there is a lock operated by the State of New York, which has a depth of less than 5 feet over the lower miter sill. Above the dam there is slack water with a navigable depth of about 10 feet for a distance of 2.6 miles to the mouth of the fourth branch of the Mohawk River at Waterford, at which point there is at present a connection with the Champlain Canal, and where the barge canal being constructed by the State to replace the old Erie Canal will leave the Hudson River.

"The improvement now proposed is the extension by the United States of the 12-foot project from its present terminus at the State dam to the town of Waterford. The works necessary consist of a new lock and dam to replace the existing State structures, and of certain excavation to project dimensions both above and below the dam. In his report of December 28, 1906, Col. Lockwood presents alternative estimates of \$934,900 and \$1,124,100 as the cost of constructing the proposed channel on the east and west sides of the river, respectively.

"For the reasons given in its final report of the 7th instant, also herewith, the Board of Engineers for Rivers and Harbors concurs in the opinion of the district officer that the location of the new channel on the west shore of the river has advantages in its favor sufficient to justify its selection, even at the estimated additional cost. The board believes that the cost of this improvement is reasonable when compared with the benefits which may be expected to result therefrom and that it is advisable to extend the existing project in accordance with the plan proposed.

"The work contemplated in these reports is entirely feasible from an engineering standpoint. It forms a part

of the work proposed by the State of New York for its enlarged barge canal, and is included by the State engineer and surveyor in his estimate for the canal. In its relation to the New York barge canal it is in a position which resembles, in a certain degree, that of the enlargement of Black Rock Harbor at the other end of the canal. This enlargement is also included in the estimate of the State engineer and surveyor alluded to above. In both cases the idea is expressed that if the work is not undertaken by the United States Government it will have to be done by the State of New York."

By the amendment to chapter 147 of the laws of 1903 made by chapter 494 of the laws of 1907 (1 Consolidated Laws of New York, p. 533) the legislature has provided that—

"The waters, surplus or otherwise, created or impounded as a result of the improvement of the Erie, Champlain and Oswego canals, pursuant to the provisions of this act, or from the construction of any dam or dams, mole or moles, reservoir or reservoirs, or other structures, connected therewith, shall not be leased, sold or otherwise disposed of, until the improvement of said canals as contemplated in this act, and amendments thereto, shall have been finally completed, nor thereafter until authorized by statute setting forth specific terms, conditions and restrictions governing the same."

The constitution of the State of New York, section 8 of article 7, provides that "the legislature shall not sell, lease or otherwise dispose of the Erie Canal, \* \* \* but they [it] shall remain the property of the State and under its management forever."

The fact that the water power created by the construction of a new lock and dam by the United States would belong to the United States (*Green Bay and Mississippi Canal Co. v. Patten Paper Co.*, 172 U. S. 58), and that the construction of the new lock and dam by the United States would divest the State of jurisdiction over that portion of the canal, appear to have actuated the State canal board in attempting to rescind its resolution of November

22, 1910. Thus, the rescinding resolution of April 28, 1911, according to the copy transmitted, states:

"Whereas, it is the policy of this State to conserve its natural resources and develop them for the benefit of the people, and

"Whereas it may be claimed that the above resolution may interfere with such policy and permit the use of such water by some other agency than the State, and may remove from the jurisdiction of the State of New York an integral part of the canal system of the State, and

"It being considered that such an abandonment is neither expedient, desirable, nor economical,

"Therefore be it resolved, that the resolution above mentioned, adopted November 22nd, 1910, be, and the same is hereby, rescinded, \* \* \*."

That the State canal board had authority to abandon the State lock and dam and authorize their destruction in furtherance of the improvement authorized by the State would seem to be unquestioned. But whether it could do so in anticipation of, and for the purpose of giving effect to, the improvement authorized by Congress, which would result in Federal control over that portion of the Hudson occupied by the new lock and dam, and used as a portion of the State canal, is more doubtful. The State might perhaps do it, notwithstanding the constitutional provision referred to, in view of the fact that this portion of the canal is in a navigable waterway of the United States, and therefore not subject to absolute ownership by the State, but necessarily under Federal jurisdiction whenever Congress chose to exercise it. But the canal board does not possess legislative power, and can only do that which it is authorized by the legislature to do.

The action indicated in the resolution of the canal board of November 22, 1910, may, however, be good as an extinguishment of the existing leases and a resumption of the surplus water created by the State lock and dam, although not as an abandonment of those structures. The condition of the action of Congress is that all existing power rights and privileges affected by the improvement authorized be extinguished. This, it was supposed, would be

effected by the abandonment of the State lock and dam by the canal board, but if otherwise effected, the condition would be substantially met. The idea seems to have been to relieve the Federal Government of any possible claim for damages arising out of the destruction of the State lock and dam. The fear seems to have been an idle one, in view of the paramount control of Congress over the Hudson River as a navigable waterway of the United States, and the fact that the rights and privileges referred to were, both in terms and as a matter of constitutional law, dependent upon the maintenance of the State lock and dam, which Congress could declare an obstruction to navigation and require the State to remove it at its own expense (*Monongahela Navigation Co. v. The United States*, 148 U. S. 312, 336; *West Chicago Street Railroad Co. v. Chicago*, 201 U. S. 506; *Union Bridge Co. v. The United States*, 204 U. S. 364; *Monongahela Bridge Co. v. The United States*, 216 U. S. 177). But however that may be, Congress did not choose to exert its whole power, but made the expenditure of the appropriation for the improvement authorized dependent upon the extinguishment by the State of the power rights or privileges affected thereby.

I understand that you do not wish to antagonize the State authorities in this matter, who have indicated that they prefer themselves to construct that part of the proposed improvement which involves the construction of a new lock and dam and the destruction of the present lock and dam, in order to retain jurisdiction and control over the same in the State; that your purpose is to submit this matter to Congress, and that you are now concerned only with the validity of the contracts which have been let for the construction of the work involved in the improvement authorized not dependent upon the construction of the new lock and dam or the destruction of the State lock and dam, and the legality of the expenditures already made, these contracts and the expenditures having been made upon the faith of the action taken by the State canal board in its resolution of November 22, 1910.

Under the circumstances stated, and in view of the fact that the action indicated in the resolution of the State



canal board of November 22, 1910, was accepted and acted upon by you as a sufficient compliance with the terms of the act of Congress authorizing the improvement in question; that this was a matter primarily for you to determine, and that the insufficiency of such action to extinguish the existing power rights and privileges affected by the improvement is not clearly apparent, I think that the action taken by you should be upheld, notwithstanding the attempt of the canal board to rescind that resolution, and that you are justified in making such further expenditures under said appropriation as the interests of the United States in the premises seem to require.

What has been said renders it unnecessary to reply categorically to the questions submitted.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

---

#### REGISTRY AND ENROLLMENT OF VESSELS.

A vessel belonging to a domestic corporation is entitled to registry or enrollment, even though some stock of the company be owned by aliens.

DEPARTMENT OF JUSTICE,  
*July 11, 1911.*

SIR: I have the honor to acknowledge the receipt of your letters of the 21st and 29th of June, in which you ask whether the vessel, *New Island Wanderer* is entitled to the "privileges of vessels employed in the coasting trade" of the United States.

You state that said vessel is American built and is owned by the Thousand Island Steamboat Co., a corporation duly organized and existing under the laws of the State of New York; that recently most, if not all, of the capital stock of the corporation has been acquired and is now owned by aliens, citizens, and residents of Canada, and that all the officers of the corporation are aliens, with the exception of three directors, who are citizens and residents of the United States.

The answer to your question depends upon an examination of the navigation laws.

Section 4311, title, "Regulation of Commerce and Navigation," of the Revised Statutes of the United States, provides that vessels enrolled in pursuance of such title and no others "shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting-trade or fisheries."

Section 4312, Revised Statutes, provides that "in order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel."

Section 4132, Revised Statutes, provides that certain vessels "belonging wholly to citizens," or, "being wholly owned by citizens, and no others, may be registered as directed in this title."

Section 4131 provides that vessels registered or enrolled pursuant to law, and no others, "shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but no such vessel shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States or *a corporation created under the laws of any of the States thereof* \* \* \*."

The underscored portion of this section was added by the act of May 28, 1896 (29 Stat. 188).

Clearly the policy of the law is that no vessel is a vessel of the United States for purposes of registry or enrollment unless it belongs to citizens of the United States.

Whether a corporation is such a citizen depends upon the intention of the legislature, to be found in the statutes themselves.

The original navigation act of September 1, 1789 (1 Stat. 55), provided for the registry of vessels in the foreign trade, and their enrollment in the coasting trade or fisheries. On December 31, 1792 (ib. 287), was passed a new statute relating solely to the registering of ships in the foreign trade; and the later act of February 18, 1793 (ib. 305), regulated the enrollment of vessels in the coasting trade.

The foregoing sections of the Revised Statutes are taken largely from these statutes. None of them refers to the registry of vessels owned by corporations.

The act of March 3, 1825 (4 Stat. 129), provided that enrollments and registers for steamboats or vessels, owned by any incorporated company, may be issued in the name of the president or secretary of such company; and that such enrollments and registers shall not be vacated or affected by a sale of any share or shares of any stockholder, or stockholders in such company (secs. 1 and 2); that upon the death, removal, or resignation of such president or secretary, a new register or enrollment shall be taken out (sec. 3); that previously to the obtaining of such enrollment or register, the president or secretary shall swear as to the ownership of the vessel by such company, without designating the names of the persons composing the company (sec. 4); and (sec. 5) that such oath shall contain a statement that "no part of such steamboat or vessel has been, or is then, owned by any foreigner or foreigners."

The first four sections of this act have become sections 4314 and 4315 Revised Statutes, relating to enrollments and sections 4137, 4138, and 4139 Revised Statutes, relating to registers, while the fifth section was repealed by act of June 11, 1858 (11 Stat. 313).

Upon a consideration of the several statutes, I am of opinion that in the act of 1825 Congress declared a corporation of the United States a "citizen" thereof within the meaning of the navigation laws. Therefore, a vessel belonging to a domestic corporation is owned by a citizen of the United States, even though some of the stock in that corporation belongs to aliens; alien stockholders have neither the legal nor equitable ownership of any part of the vessel. As said by the Supreme Court of the United States in *Humphreys v. Mc Kissock* (140 U. S. 304, 312):

"Both the commissioner and the court \* \* \* seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. \* \* \* The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it."

In its later enactments upon the subject Congress clearly indicates the same view.

Section 1 of the act to encourage American shipbuilding, of May 10, 1892 (27 Stat. 27), authorized the issue of registers to certain foreign-built vessels, of which not less than 90 per cent of the shares of the capital of the foreign corporation owning the same was owned by citizens of the United States, "*including as such citizens corporations created under the laws of any of the States thereof,*" upon the American owners of such majority interest obtaining full and complete title and transfer to such steamships from the foreign corporations owning the same.

And in the act of May 28, 1896, amending section 4131, *supra*, Congress uses the expression "a corporation created under the laws of any of the States" as synonymous with "citizen of the United States."

Section 4142, Revised Statutes, is not inconsistent with this view. That section requires the taking of an oath, in order to the registry of any vessel, "that there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested in such vessel, or in the profits or issues thereof." As this provision first appears in section 4 of the act of December 31, 1792, it would seem to be required only in the oath of an American owner residing abroad. However, the courts early construed the law as requiring this statement in all oaths (*Scudder v. Calais Steamboat Co.*, 21 Federal Cases No. 12566, per Curtis, circuit justice), and I believe that such is the present practice. Assuming, especially in view of a slight change in the language of this section as carried forward into section 4142 in the revision of the laws, that this construction is correct, the interest meant is clearly an interest by way of ownership, and as before stated the owner of stock in a corporation has no such interest in its property.

A similar question was raised in *United States v. Delaware and Hudson Co.*, 213 U. S. 366, where the Supreme Court construed the so-called commodities clause of the Hepburn Act of June 29, 1906. That clause provided that it should be unlawful for any railroad company to transport in interstate or foreign commerce any commodity

owned by it in whole or in part "or in which it may have any interest, direct or indirect." The United States filed a bill to restrain, among other things, some of the carriers from transporting coal belonging to a corporation some of the stock of which was owned by the carrier. The Supreme Court, applying the foregoing reasoning, held (413, 414) that the carrier had no interest, direct or indirect, in the property of the corporation whose stock it owned. This construction of substantially the same language seems controlling here.

In a letter to the Secretary of the Treasury of April 16, 1884, Attorney General Brewster expressed the same opinion. (See Treasury Decisions for 1884, p. 187, No. 6316.)

Mr. Brewster referred with approval to the English case of *Queen v. Arnaud* (9 Adolphus and Ellis, N. S. 806), decided in 1846, where the Court of Queen's Bench construed similar British statutes in the same way. There Lord Chief Justice Denman said:

"It is said that some of the members of the corporation are not British subjects, but foreigners, and, consequently, that the vessel does not *wholly* belong to Her Majesty's subjects, as required by the fifth section of the act, and is within the prohibition, contained in the twelfth section of the act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered.

"Now, it appears to us that the British corporation is, as such, the *sole owner* of the ship, and a British subject within the meaning of the fifth section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be *owners* of the vessel.

"The individual members of the corporation, no doubt, are interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction; but in no *legal sense* are the individual members the owners. If all the individuals of the

corporation were duly qualified British subjects, they could not register the vessel in their individual names *as owners*, but must register it as belonging wholly to the corporation as owner (p. 816)."

This view is also supported by the unbroken practice since 1858 of the departments called upon to construe the acts in question.

The Secretary of the Treasury in his letter of April 14, 1884, upon which Mr. Brewster's opinion was based, said:

'The practice and ruling of this department has been to regard all companies incorporated under State law as entitled to hold vessels of the United States as property so as to take out marine documents for them by virtue of said sections and the laws from which they were reproduced in the Revised Statutes, without considering the citizenship of the stockholders or incorporators since the repeal of the fifth section of the act of March 3, 1825, by act of June 11, 1858.'

And from the letter of the Commissioner of Navigation which you transmit to me, it appears that such is still the practice of your department.

Article 6 of the Customs and Navigation Regulations of 1869 and 1874, appearing in the editions of 1884, 1892, 1899, and 1908 as article 7, provides:

"Marine documents may be issued for vessels owned by an incorporated company within the United States, in the name of the president or secretary of such company, and they will not be vacated or affected by the sale of a share or shares of a stockholder or stockholders in such company, even though such stockholders be foreigners."

Article 5 of the same regulations (editions of 1899 and 1908) gives as class 1 of the vessels entitled to receive documents under the existing laws—

"Those built in the United States, wholly owned by a citizen or by an incorporated company of the United States."

I beg to advise you, therefore, that in my opinion a vessel belonging to a domestic corporation is entitled to registry or enrollment, even though some stock of the company be owned by aliens.

194 *Ocean Mail Service—Ports of Colon and Panama.*

In this opinion I have assumed that "The Thousand Island Steamboat Co." is a *bona fide* corporation existing under the laws of the State of New York, although some doubt as to that fact appears in the papers which you transmitted to me. Of course, if the corporate life of that company had been terminated or its charter forfeited, the reasoning in this opinion would not apply.

I beg to return herewith the papers and files in the case as requested by you.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

OCEAN MAIL SERVICE—FOREIGN PORTS—COLON AND PANAMA.

The cities of Panama and Colon and the harbors adjacent to said cities being reserved as a part of the Republic of Panama in the grant of the Canal Zone to the United States, the ports of Panama and Colon are foreign ports within the meaning of the act of March 3, 1891 (26 Stat. 830), providing for ocean mail service between the United States and foreign ports.

Vessels using the Government docks at Cristobal and Balboa, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, would be carrying mails between the United States and foreign ports within the spirit and letter of said act of March 3, 1891.

In entering into contracts for carrying foreign mails under the act of March 3, 1891 (26 Stat. 830), the Postmaster General, in the promotion of the commercial interests of the United States, has authority to reject any bid not in his opinion reasonable for attaining such purpose and may notify prospective bidders in advance of his purpose not to entertain such bids and may reserve the right to rescind the contract if a material condition thereof be disregarded by the contractors.

DEPARTMENT OF JUSTICE,

July 12, 1911.

SIR: Referring to your letter of the 16th ultimo, transmitting for my consideration certain papers relating to the proposed ocean mail service between New York and Colon on the Atlantic and between San Francisco and Panama on the Pacific, I beg to return the same with an expression of my opinion on certain questions suggested therein.

The service referred to is to be established under the provisions of the act of March 3, 1891 (26 Stat. 830), entitled "An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce."

The first section of that act authorizes and empowers the Postmaster General "to enter into contracts for a term not less than five nor more than ten years in duration, with American citizens, for the carrying of mails on American steamships, between ports of the United States and such ports in foreign countries, the Dominion of Canada excepted, as in his judgment will best subserve and promote the postal and commercial interests of the United States, the mail service on such lines to be equitably distributed among the Atlantic, Mexican Gulf, and Pacific ports." Section 2 provides for the advertising and letting of said contracts. Section 3 requires that the steamship shall be of American build, officered by American citizens, and manned in certain proportions by American crews. This section also divides such steamships into four classes, and specifies the manner and material of their build, tonnage and rate of speed, particulars which differs with the class. Section 4 provides that the ships shall be constructed according to plans and specifications approved by the Secretary of the Navy, and of sufficient strength to be readily convertible into cruisers. Section 5 fixes the maximum rate of compensation to be paid for such ocean mail service to the ships of each class "for each outward voyage." It is unnecessary to refer to the other provisions of the statute.

The first question suggested is "whether the ports of Colon and Panama will, after the canal is constructed, remain foreign ports?"

The treaty with the Republic of Panama, by which "the use, occupation, and control" of the Canal Zone is granted to the United States "in perpetuity," provides (33 Stat. 2234, 2235)—

"that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant."

Being thus reserved as a part of the Republic of Panama, such cities are territory of that country and therefore



foreign ports. I am not advised of any provision that will change their status when the canal is constructed.

It appears from the papers transmitted by you that it will be more convenient for the vessels contracting for this mail service to use principally the Government docks, which are being constructed at Cristobal on the Atlantic side and Balboa on the Pacific side; and the question arises whether by using these docks, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, the vessels would be carrying mails to foreign ports. It is stated in this connection that docking the large vessels at the cities of Colon and Panama would result in serious loss of time, and that the actual call at these places could be obviated by the use of a tender to meet the vessels upon entering the "harbor adjacent to these ports" to receive and deliver the mail in Colon and Panama, the vessels then proceeding to the Government docks at Cristobal and Balboa.

It has been held that the purpose of the act of March 3, 1891, is "to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms," and that this statute, "designed to promote foreign commerce, is entitled to a liberal construction, with a view to carrying out the purpose of its enactment." (20 Op. 98, 101.)

In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between "ports of the United States" and "ports of foreign countries." The word "port" is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its inclosures and projections of land, where ships take refuge and seek shelter (*United States v. Morel*, 26 Fed. Cas. 1310; *De Longuemere v. New York Fire Insurance Co.* 10 Johns. (N. Y.) 120, 124; *Mobile Marine Dock Co. v. McMillan*, 27 Ala. 77, 99; *Martin v. Hilton*, 9 Metc. 371, 378). Construing the word "port" as synonymous with "harbor" the vessels unquestionably would be carrying the mails to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also "the harbors adjacent to said cities." In

any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act.

Referring doubtless to the provision of section 5 of the statute, which limits the compensation to the outward voyage and makes its rate depend upon the class of the ship, in which calculation speed is an important factor, the Second Assistant Postmaster General, in his memorandum of June 16, 1911, accompanying your letter, states that "in case the large vessels do not actually enter the docks of Colon and Panama, but transship the mails to the tenders referred to, the actual distance to the point of transshipment will be paid for." This would be a necessary requirement under the act.

Advice is also desired as to the authority of the Postmaster General in connection with sections 15 and 16 of the proposed instructions to bidders, which read:

"15. No award of contract for the mail service on the routes herein described will be made to any bidder who shall be engaged in any competitive transportation business by rail, or who shall be engaged in the business of exporting or importing goods, wares, merchandise, or other property on his own account, or who shall bid for on behalf of or in the interest of any person or corporation engaged in such business, or either of them, or having the control thereof through stock ownership or otherwise.

"16. The right is reserved to the Postmaster General to cancel without indemnity to the contractor any contract entered into under the advertisement if at any time the performance of the same shall rest within the control of any competitive railroad company or of any person or persons in control of the same through stock ownership or otherwise, or if any party to any such contract shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."

The statute in question does not expressly authorize the Postmaster General to insert such qualifications or conditions as these paragraphs contain in the advertisements for carrying the ocean mails, which he is required by section 2 of the act to make. That section provides:

“SEC. 2. That before making any contract for carrying ocean mails in accordance with this act the Postmaster General shall give public notice by advertising once a week, for three months, in such daily papers as he shall select in each of the cities of Boston, New York, Philadelphia, Baltimore, New Orleans, St. Louis, Charleston, Norfolk, Savannah, Galveston, and Mobile, and when the proposed service is to be on the Pacific Ocean, then in San Francisco, Tacoma, and Portland. Such notice shall describe the route, the time when such contract will be made, the duration of the same, the size of the steamers to be used, the number of trips a year, the times of sailing, and the time when the service shall commence, which shall not be more than three years after the contract shall be let. The details of the mode of advertising and letting such contracts shall be conducted in the manner prescribed in chapter eight of title forty-six of the Revised Statutes for the letting of inland mail contracts so far as the same shall be applicable to the ocean mail service.”

Section 1 of the act, however, authorizes the Postmaster General to enter into contracts of the character specified “as in his judgment will best subserve and promote the postal *and commercial* interests of the United States.” It further provides that “said contracts shall be made with the lowest responsible bidder for the performance of said service on each route, *and the Postmaster General shall have the right to reject all bids not in his opinion reasonable for the attaining of the purposes named.*” It is evident from these provisions that the promotion of the commercial interests of the United States was an important object of the statute, and that the Postmaster General is expressly authorized to reject any bid not in his opinion reasonable for attaining such purpose. Having authority to reject a bid upon such grounds, he would necessarily have authority to notify prospective bidders in advance of his purpose not

to entertain such bids, and to reserve the right to rescind the contract if a material condition thereof were disregarded by the contractors. The paragraphs of the instructions to bidders above quoted manifestly have a direct relation to the commercial interests of the United States in the proposed service. They are in accord with the general policy of the Government as illustrated in the interstate commerce and antitrust legislation, and are, in my judgment, fully authorized by the act. The situation in this respect is analogous to that in *United States v. Mora*, 97 U. S. 413, 421, where it was said that a collector of customs, having authority to refuse the clearance of a vessel, might exact a bond differing materially from that specifically authorized by the statute for the purpose of accomplishing the object thereof.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

---

EXECUTION OF CONTRACT FOR PRINTED FACING SLIPS FOR  
GOVERNMENT BY EMPLOYEE OF POSTAL SERVICE.

An employee of the postal service who merely executes a contract with the United States, or a department thereof, on behalf of a corporation of which he is president, can not be said to be an agent for the corporation "in any business before the department" within the meaning of section 226 of the Criminal Code, and a contract thus executed may be legally entered into by the Postmaster General for what are known as "printed facing slips" to be used as labels on packages of letters.

DEPARTMENT OF JUSTICE,

*July 13, 1911.*

SIR: I beg to acknowledge the receipt of your letter of the 3d instant, in which you request my opinion as to whether the Post Office Department may legally enter into a contract with the Feist Printing Co. for what are known as "printed facing slips," to be used as labels on packages of letters. You state that the lowest bidder for this contract is the "Feist Printing Co., by W. A. Feist, president;" that this company is a corporation organized under the laws of the State of Pennsylvania, and doing business at

White Haven in that State; and that W. A. Feist, president of the company, who signed the contract on its behalf, is postmaster of that city, having served in that capacity since 1900, under presidential appointment.

You further state that protest has been made against awarding this contract to the Feist Printing Co. on the ground that "it is not permissible for an employee of the Government to be interested in any contract with the Government."

Section 3850 of the Revised Statutes provides:

"No postmaster, assistant postmaster, or clerk employed in any post office shall be a contractor, or *concerned in any contract*, for carrying the mail."

Section 226 of the Criminal Code, passed March 4, 1909, c. 321, 35 Stat. 1088, 1134, provides:

"Whoever, being a person employed in the postal service, *shall become interested in any contract for carrying the mail, or act as agent, with or without compensation, for any contractor or person offering to become a contractor in any business before the Department*, shall be immediately dismissed from office, and shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both."

These two sections are the only ones I have been able to discover having any reference to an employee of the postal service "being interested" in a contract with the Government, or prohibiting such interest. As these two sections only prohibit such employee from becoming "interested in" or "concerned in" a contract *for carrying the mails*, and as the proposed contract with the Feist Printing Co., referred to in your letter, is not a contract for carrying the mail, but a contract for *supplies*, it is apparent that no objection can be made to this contract merely upon the broad ground that an employee of the postal service is "interested" therein, or that a postmaster is "concerned" therewith.

It becomes necessary, therefore, to consider whether this contract with the Feist Printing Co. is prohibited by the latter clause of section 226 of the Criminal Code referred to

above, in that W. A. Feist, "being a person employed in the postal service," did, in signing this contract on behalf of the Feist Printing Co., "act as agent \* \* \* for a contractor \* \* \* in any business before the department." For, if W. A. Feist was so employed and so acted, within the meaning of said section, then, it would seem clear, the Postmaster General would have no power to enter into the contract proposed with the Feist Printing Co., when the agent, who executed it on behalf of said company, committed a crime against the United States in the very act of so doing.

I am satisfied, and for the purposes of this opinion I assume, that W. A. Feist was "a person employed in the postal service," within the meaning of section 226 aforesaid. Without elaborating the point, I may say that this section is taken from section 412 of the Revised Statutes, which was limited to persons "employed in the Post Office Department." In incorporating it in the Code Congress changed it so as to apply to all persons in the postal service.

The power, therefore, of the Postmaster General to enter into the contract referred to with the Feist Printing Co. depends upon the answer to the second question mentioned, namely, was W. A. Feist the "agent" "for any contractor or person offering to become a contractor in any business before the department."

In the Machen case, 24 Op. 557, Machen Bros. entered into a contract to furnish coal to the Post Office Department, and A. W. Machen, superintendent of free delivery, was a member of that firm. Interpreting section 412, Revised Statutes, for which section 226 of the Criminal Code has been substituted, Attorney General Knox advised that Machen was not an "agent," but a principal. He said, p. 559:

"The statute is in derogation of common right, and is quasi penal in character. It provides for the immediate dismissal of any post-office employee who does act as such agent, \* \* \*. It must, therefore, be strictly construed. Under such construction a partner can not be

held to be an 'agent,' for he is a principal, at least in making a joint bid for a contract."

Section 226 of the Criminal Code is even a more fit subject for a strict construction than section 412 of the Revised Statutes, since section 226 provides that the offending employee "shall be immediately dismissed from office, and shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both."

To reach a proper construction of section 226, it should be read in connection with certain other sections of the Criminal Code relating to similar offenses. These sections are contained in chapter 5 of the code, under the heading "Offenses relating to official duties," and are as follows:

"SEC. 109. Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, \* \* \* shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, \* \* \* shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

"SEC. 112. Whoever, \* \* \* being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer, or department thereof, for any person whatever, \* \* \* shall be fined not more than ten thousand dollars and imprisoned not more than two years, \* \* \*.

"SEC. 113. Whoever, \* \* \* being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim,

controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, *before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever*, shall be fined not more than ten thousand dollars and imprisoned not more than two years, \* \* \*."

Reading section 226 of the Criminal Code in connection with and in the light of these previous sections of the same code, relating to offenses of a very similar character, the question arises whether an employee of the postal service who merely executes a contract with the United States, or a department thereof, on behalf of a corporation of which he is president, can be said to be an agent for the corporation "*in any business before the department*," and to have rendered himself subject to the severe penalties prescribed by section 226.

It seems obvious that the provisions of the statutes referred to above, including section 226, were aimed, to speak generally, at the evil arising from the use, by a public officer or employee, of his official position to procure contracts, favors, or benefits from the Government of which he is a member. These statutes all seem to have in view an act by the employee which shall enter into the procuring of some favor from the Government and be influential to that end. Of course, the act of the public official need not be the entire moving cause of the awarding of a contract with the Government, or the procuring of a favor or benefit therefrom, but it must be influential to that end and concerned therewith.

Thus, section 109 of the code refers to the prosecution of a claim against the Government by an officer, etc. Section 112 refers to the procuring of a contract or office from the Government by the public official. Section 113 refers to services rendered by the public official in relation to proceedings and controversies before a department, or a bureau, or a court, or things of that character.

These statutes all contemplate some active work done by the public officer, directed to influence official action in some way, before some department, or board, or officer, of



the United States Government. And especially section 113, which describes an offense very similar to that described in section 226, evidently does not refer to any mere clerical or formal acts, such as writing or signing contracts, making out statements, or the like; but refers plainly to some action taken by the public official within the immediate jurisdiction and scope of the department or bureau, and connected intimately, in some way, with the action of the department or bureau.

I think section 226 should have a similar construction and that the word "agent" in that section should be considered limited and qualified by the succeeding words, "*in any business before the department*," and that, therefore, a person employed in the postal service becomes liable to the penalties of that section only when his action, as agent of the contractor, comes, in a fair sense, within the scope and jurisdiction of the department; when it is done, as it were, in the presence of the department, in a legal sense, and when it is directed, to some extent or to some degree, at any rate, to procuring action from the department, either in the negotiation and execution of a contract or in the settlement thereof or in making some claim thereon. Thus limited, the term seems to me to be extended as far as the legislature intended, in view of the evils it evidently meant to combat and in view of the penalties prescribed by the act.

My opinion, therefore, is that W. A. Feist was not the agent of the Feist Printing Co. within the meaning of section 226 of the Criminal Code, so far as the contract referred to in your letter of the 3d instant is concerned, provided the only part he took in the execution and negotiation of the contract was the signing thereof; and that, assuming this to be the fact, the Postmaster General may legally enter into the contract with the Feist Printing Co. as proposed.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

## PORTO RICO—TRANSFER OF NAVAL STATIONS.

Any part of the naval stations in Porto Rico may be transferred to the Government of Porto Rico under the act of June 14, 1910 (36 Stat. 467), provided it was reserved under the authority conferred by the act of July 1, 1902 (32 Stat. 731), is adjacent to the city of San Juan, and is no longer needed for purposes of the United States.

The portions of that tract of land on the Caguas Road in the city of San Juan which were not included in the President's proclamation of August 4, 1908 (35 Stat. 2197), may be now conveyed to Porto Rico. The land, however, which was ceded to the United States by the insular government of Porto Rico in return for the portions of said tract of land conveyed by the proclamation of August 4, 1908, not having been reserved under the act of July 1, 1902, may not now be conveyed to the people of Porto Rico under the act of June 14, 1910.

While the transfer to the insular government may be made by the Secretary of the Navy, since in contemplation of law the acts of the heads of the executive departments are the acts of the President, yet it would be preferable to have the formal transfer effected by presidential proclamation.

As to those parts of the naval stations which are not adjacent to the city of San Juan, or are otherwise not within the provisions of the act of 1910, there is no warrant of law for their formal transfer or cession. Permission, however, may be given to the Porto Rican government through a letter or instrument in the nature of a revocable license for the use of these parts of the stations and the buildings thereon and for the construction of improvements temporary in nature. But it should not be attempted to transfer their permanent control to the insular government, nor would it be proper to permit the erection of improvements that would in fact be permanent.

Any part or parts of the naval stations in Porto Rico no longer needed for the purposes of the Navy Department may be transferred to the control of the War Department or of any other department, either by formal Executive order or by arrangement between the Secretary of the Navy and the head of the other department.

## DEPARTMENT OF JUSTICE,

*July 17, 1911.*

SIR: I have the honor to respond to the questions presented to me by your letter of June 14, 1911, with respect to the proposed transfer of the naval stations in Porto Rico. You ask whether you have "the authority to transfer by revocable licenses or otherwise the stations as a whole to the War Department or to the insular government or the people of Porto Rico," and also whether you may "grant revocable licenses to the insular government

or the people of Porto Rico for the erection of buildings and improvements permanent in their nature," or whether you are "limited to the granting of revocable licenses for the use of existing buildings and improvements temporary in nature."

I am of the opinion that certain parts of the naval stations may be transferred outright to the government of Porto Rico. By the act of June 14, 1910, chapter 290, it was enacted:

"That the President is hereby authorized, in his discretion, to convey to the people of Porto Rico such lands and buildings, or interests therein, adjacent to the city of San Juan, reserved for public uses under the authority conferred by the act approved July first, nineteen hundred and two (Thirty-second Statutes at Large, page seven hundred and thirty-one), as in his opinion are no longer needed for purposes of the United States." (36 Stat. 467.) Here is a statute clear and unambiguous in terms. Resort therefore to extraneous matter to determine its meaning is not necessary nor would it be proper. I am quite satisfied that authority exists—simply as the statute declares—to transfer to the government of Porto Rico any part of the naval stations, provided it was reserved under the authority conferred by the act of July 1, 1902, is adjacent to the city of San Juan, and is no longer needed for purposes of the United States.

It may be mentioned that the lands reserved for naval purposes under the act of July 1, 1902, are described in the proclamation of June 26, 1903. (33 Stat. 2314.) Whether the other conditions in the act of 1910 as above explained are fulfilled may be determined by yourself in each case.

A factor to be observed here is the act of March 4, 1907, chapter 2927. (34 Stat. 1410.) In pursuance of authority therein granted the President, by proclamation of August 4, 1908 (35 Stat. 2197), transferred to the insular government certain portions of an 80-acre parcel of land on the Caguas Road in the city of San Juan. The portions of that parcel not included in this proclamation may, of course, be now conveyed to Porto Rico, since they are within the scope of the authority under discussion. In return, however, for

this conveyance of 1908 and in pursuance of the act of 1907 the insular government ceded to the United States certain other specified tracts; and it is to be borne in mind that these tracts, not having been reserved under the act of 1902, may not now be conveyed to the people of Porto Rico under the act of 1910.

I think it proper to say that while the transfer to the insular government may be made by yourself, since in contemplation of law the acts of the heads of the executive departments are the acts of the President (*Wilcox v. McConnel*, 13 Pet. 498, 513; *Wood v. Beach*, 156 U. S. 548), yet I believe it would be preferable to have the formal transfer effected by presidential proclamation, as was done in the case of the two former acts of Congress relating to these lands.

As to those parts of the naval stations which are not adjacent to the city of San Juan, or are otherwise not within the provisions of the act of 1910, but which it may be desirable that the insular government should use, other considerations must be observed. For their formal transfer or cession there is no warrant of law. I believe, however, that under a doctrine sanctioned by long-continued observance permission may be given to the Porto Rican government through a letter or instrument in the nature of a revocable license for the use of these parts of the stations and the buildings thereon and for the construction of improvements temporary in nature. But it should not be attempted to transfer their permanent control to the insular government. Nor would it be proper, even under the broadest limits of this doctrine, to permit the erection of improvements that would in fact be permanent. The principles underlying this doctrine have been considered and defined at different times by my predecessors. (See 21 Op. 537; id. 565; 22 id. 240; id. 544.) Thus Attorney General Griggs, in advising the Secretary of War that he might grant a revocable license to a railway company to lay a single track on the aqueduct reservation near Cabin John Bridge, used the following language:

“Long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Gov-

ernment reservations by such licensees without legislative objection from Congress and without the adoption of any legislative rule upon the subject, implies the tacit assent of Congress of this custom. At the same time, I deem it proper to call your attention to the fact that this custom can not be maintained upon any ground except benefit to the public interests, either directly or indirectly. It can not be used as a basis for granting, under the guise of a temporary license, a substantially permanent right to maintain a railroad." (22 Op. 245.)

While the opinions just cited were confined to the question of granting a license to a private person for the use of Government reservations, yet I think the present case should be considered as governed by the same principles, since the proposal is to permit the use of the property of the United States Government by persons or agencies other than its own departments.

There remains the question of your power to transfer to another department the control of the lands in Porto Rico no longer needed for the purposes of your own department and desired by the other. And this question, of course, is concerned as well—referring now to the act of 1910 and to the first part of this opinion—with those parts of the stations adjacent to the city of San Juan and reserved under the act of 1902, as with other parts; for if any part is needed for any department of the United States it should not be released, and indeed may not be released, since the act of 1910 even within its geographical scope authorizes a conveyance only in case the property is no longer needed for purposes of the United States.

That such power exists is the conclusion of two recent opinions. The opinion of November 3, 1904, by Solicitor General Hoyt, approved by Attorney General Moody, holding that the Secretary of the Navy had authority to transfer to the Secretary of Commerce and Labor for the extension of a lighthouse reservation the control of certain land at San Juan reserved by Executive order for naval purposes, is precisely in point here. (25 Op. 269.) In an opinion of April 29, 1910, this was approved, and I advised you that the President has authority to transfer

to the War Department for military purposes the use and control of lands in the Philippine Islands reserved by Executive order for naval purposes. (28 Op. 262.) *Mutatis mutandis*, everything there said is entirely pertinent and controlling here; for the legislation of Congress relating to public lands in Porto Rico is from the viewpoint of the present problem in nowise to be distinguished from that relating to the public lands in the Philippines. And I adhere to that opinion. (See also 16 Op. 124.)

I advise you, therefore, that any part or parts of the naval stations in Porto Rico no longer needed for the purposes of your department may be transferred to the control of the War Department or of any other department, either by formal Executive order or by arrangement between yourself and the head of the other department, since, as pointed out before, this would be in effect the act of the President.

I return the papers submitted with your letter.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

COPYRIGHT LAW—DATE IN PRESIDENT'S PROCLAMATION.

Under section 8 of the copyright act of March 4, 1909 (35 Stat. 1077), the President is required to determine by proclamation the existence of the reciprocal conditions upon which alien authors and composers may acquire the general privileges under said act, and the date when the reciprocal condition was actually met by the laws of any foreign state or nation is the one which should be inserted in the proclamation.

DEPARTMENT OF JUSTICE,

*July 24, 1911.*

SIR: I have the honor to acknowledge receipt of your letter of the 15th instant, inclosing certain communications from the Librarian of Congress and the Register of Copyrights.

From these it appears that the Cuban secretary of state, on May 29, 1911, informed the American minister at Habana that the legislation of Cuba "at present conceded"

to citizens of the United States similar rights to those accorded under section 1 (e) of the copyright law of March 4, 1909 (35 Stat. 1075), and requested for the citizens of Cuba the reciprocal benefits given by that section.

You ask my views as to the proper date to be inserted in the proclamation of the President to be made as provided by section 8 of the act.

The date when the reciprocal condition was actually met by the laws of Cuba is the one which should be inserted in the proclamation. (See my letter to you of May 6, 1911, 29 Opinions 64.) From the information contained in the letters transmitted to me, it does not affirmatively appear that this reciprocal condition existed prior to May 29, 1911.

This is the date, then, to appear in the proclamation, unless you have or can obtain information showing that such condition actually existed at an earlier day, in which event such earlier date is the one to be stated in the proclamation.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

---

STATUS OF DEPUTY PUBLIC PRINTER AND CHIEF CLERK  
OF GOVERNMENT PRINTING OFFICE.

The Deputy Public Printer of the Government Printing Office is the proper person to perform the duties and exercise the powers prescribed by sections 20 and 36 of the act of January 12, 1895 (28 Stat. 603, 606), and the chief clerk is confined to those duties and powers which ordinarily belong to that office, as such.

DEPARTMENT OF JUSTICE,

*August 2, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 21st ultimo inclosing a letter from Senator Smoot and requesting an opinion upon the questions propounded in that letter.

Senator Smoot's letter refers to a doubt as to whether, under the law, the Deputy Public Printer or the chief clerk

should act on the boards of inspection and condemnation at the Government Printing Office or perform the duties of the Public Printer in the absence of the latter and requests an opinion as to the legal status of these officials.

The answer to Senator Smoot's inquiry depends upon the proper construction of the act of January 12, 1895, 28 Stat. 601; of the legislative, executive, and judicial appropriation act passed February 26, 1907, 34 Stat. 935; and of the sundry civil appropriation act passed March 4, 1911, 36 Stat. 1363.

The act of January 12, 1895, is entitled "An act providing for the publication, printing and binding, and the distribution of public documents." It is a comprehensive statute, passed after a thorough investigation by a joint committee of the House and Senate. After providing for the creation of a joint committee on printing and of a Public Printer and after defining the duties of this official section 20 provides as follows:

"The chief clerk, the foreman of printing, and a person designated by the Joint Committee on Printing, shall constitute a board to examine and report in writing on all paper delivered under contract, or by purchase or otherwise, at the Government Printing Office. The chief clerk, foreman of binding, and a person designated by the Joint Committee on Printing shall constitute a board to examine and report in writing on all material, except paper, for the use of the bindery. The chief clerk, the foreman of printing, and a person designated by the Joint Committee on Printing shall constitute a board of condemnation, who, upon the call of the Public Printer, shall determine the condition of presses and other machinery and material used in the Government Printing Office, with a view to condemnation."

Section 36 of said act provides:

"In case of the death, resignation, absence, or sickness of the Public Printer the chief clerk of the Government Printing Office shall perform the duties of the Public Printer until a successor is appointed or such absence or sickness shall cease;"

\* \* \* \* \*



Section 44 of said act provides:

“There shall be appointed by the Public Printer a chief clerk, who shall be a practical printer and versed in the art of book-binding, whose salary shall be two thousand four hundred dollars per annum;”

\* \* \* \* \*

The Joint Committee on Public Printing and the Public Printer had both been in existence under statutory authority for several years prior to the act of January 12, 1895, but previous to the passage of that act there had been no provision, by general law, for the boards provided for in section 20 nor had there been any provision for a chief clerk, although such an officer had been in existence under appropriation acts from at least July 8, 1889.

The legislative, executive, and judicial appropriation bill passed February 26, 1907, 34 Stat. 935, at page 943 has the following provision:

“GOVERNMENT PRINTING OFFICE.—Office of the Public Printer: Public Printer, five thousand five hundred dollars; Deputy Public Printer, three thousand six hundred dollars; private secretary, two thousand two hundred and fifty dollars;

\* \* \* \* \*

“The office of Deputy Public Printer shall be filled by the selection and appointment by the Public Printer of a person skilled as a practical printer and versed in the art of bookbinding, and who shall perform the duties heretofore required of the chief clerk, have supervision of the buildings occupied by the Government Printing Office and perform such other duties as may be required of him by the Public Printer.”

No provision whatsoever is made in this act for a chief clerk of the Government Printing Office. And it may be noted that the qualifications required of the Deputy Public Printer are practically the same qualifications required of the chief clerk by section 44 of the act of January 12, 1895. And it may be further noted that there is added in this appropriation act a “private secretary,” who had not been provided for previously.

The same language, exactly, including the specific designation of the qualifications and duties of the Deputy Public Printer, is contained in the sundry civil appropriation bill passed March 27, 1908, 35 Stat. 317, at page 381. Since that time the office of Deputy Public Printer has been provided for in each successive appropriation bill, without any reference to his qualifications or duties, and in none of these acts is there any appropriation for a chief clerk, until the passage of the act of March 4, 1911. That act, being the sundry civil appropriation act for the fiscal year ending June 30, 1912, 36 Stat. 1363, at page 1444, has the following provisions:

"PUBLIC PRINTING AND BINDING.—Office of the Public Printer: Public Printer, five thousand five hundred dollars; purchasing agent, three thousand six hundred dollars; chief clerk, two thousand five hundred dollars; \* \* \*

"Office of the Deputy Public Printer: Deputy Public Printer, four thousand five hundred dollars;"

\* \* \* \* \*

It may be noted that the "private secretary" had become, in the appropriation act of 1910, "secretary to the Public Printer," and that the appropriation for such secretary was \$2,500. So that the act of March 4, 1911, dropped this officer, and inserted in his place a "chief clerk" at the same salary; and it is further to be noted that the qualifications required of the chief clerk by section 44 of the act of January 12, 1895, are not required of the chief clerk by the act of March 4, 1911.

The question, therefore, is what effect the appropriation act of 1907 had upon the office of chief clerk created under the act of January 12, 1895, and whether the provision for a "chief clerk" in the appropriation act of March 4, 1911, had the effect to revive that office with all the powers and functions belonging to it prior to the act of 1907 and under the act of January 12, 1895.

It is my judgment that the appropriation act of 1907, in providing for a deputy public printer, who should be skilled in the art, and who should "perform the duties heretofore required of the chief clerk" had the effect, in law, entirely

to abolish the office of chief clerk of the Government Printing Office. The failure to appropriate any money for the office, coupled with the transfer of all the duties thereof to another office, worked, in my opinion, as extinguishment of the office itself as completely as though Congress had abolished it by express terms, or had expressly repealed the sections of the act of January 12, 1895, creating that office, and defining its duties and functions. I am unable to conceive of an office existing in theory where the law prescribes no powers, duties, or functions, in connection therewith.

The following authorities seem to show that an office may be abolished indirectly, as well as directly, and that, where the legislature takes away all opportunity to perform the duties of the office, or places the office in another category, or transfers the duties of the office to another person or board, the office itself is abolished:

*Ware v. United States*, 4 Wall. 617;  
*Beaman v. United States*, 19 Ct. Clms. 5;  
*United States v. Langston*, 118 U. S. 389;  
*Sawyer v. United States*, 22 Ct. Clms. 326;  
*Mathews v. United States*, 22 Ct. Clms. 330;  
*People v. Henshaw*, 76 Cal. 436;  
*Wyman v. United States*, 26 Ct. Clms. 103.

It is supposed that the principle of these decisions does not apply in this case, because the office of "Deputy Public Printer" was created merely by an appropriation act, in which act the proper word, "hereafter" was not used, and that, therefore, the office of "Chief Clerk," being created by a general statute, was merely temporarily suspended, and, when reinserted in the appropriation act of March 4, 1911, was revived with all the functions attached to it by the act of January 12, 1895. It is probably true that a mere failure to appropriate money to carry out certain general objects, which have been provided for by statute, will not have any permanent effect upon those objects; and, as the Government can only act through officers and agents, an office, created by general laws to carry out certain objects of legislation, is only less important than those objects themselves. Therefore, where certain definite ends are

proposed by statute, as in the act of January 12, 1895, and an organization of officers is provided to carry those ends into effect, it is probable that no mere failure to appropriate money for the salaries of these offices could permanently affect their legal status. In that case the office is not "suspended." There will probably be no person filling it, in the absence of a provision for a salary, but the office itself still exists. But when in addition to the failure to appropriate for the office, the legislature transfers all its functions to another office, attaching to the latter the same qualifications theretofore required of the former, then, I conceive, the substituted office takes its place in the scheme of organization, and becomes one of the statutory means to effect the end proposed by law, and the former office is not "suspended"; it is abolished. After all, an office is nothing, in law, apart from its functions, duties, and emoluments and, if the latter be taken away, the office must, necessarily, cease to exist.

It is true that the act of February 26, 1907, did not in prescribing the qualifications and duties of the Deputy Public Printer use the word "hereafter" and that this is the word usually employed by Congress when the intention is to accomplish some permanent end. Congress may, however, express this intention, permanently to abolish one office and substitute another therefor, by any apt words, as some of the cases cited above clearly show, and I think the language of the act of 1907 quoted above, viz, "The office of Deputy Public Printer shall be filled by the selection and appointment by the Public Printer of a person skilled as a practical printer and versed in the art of bookbinding, and who shall perform the duties heretofore required of the chief clerk," sufficiently indicates such an intention on the part of Congress.

The question next arises as to the effect intended by the act of March 4, 1911, in again providing for a "chief clerk," along with a "Deputy Public Printer." In my judgment the only effect intended by this legislation was to create an office with the ordinary duties of a chief clerk in the Government Printing Office, as distinguished from the extraordinary duties cast upon that official by the act

of January 12, 1895, and to leave these extraordinary duties, together with the supervision of the buildings occupied by the Government Printing Office, to the office of "Deputy Public Printer." It is too well settled to need the citation of any authorities that the act of March 4, 1911, must be construed as a whole, and in the light of prior legislation and existing conditions, so as to give effect to every part of it, if possible, and to produce, if the language of the act permit, a consistent, harmonious scheme of organization of the Government Printing Office.

At the time the act of March 4, 1911, was passed there existed in the Government Printing Office, under prior legislation, and, in fact, a Deputy Public Printer whose salary was \$4,500, who was required to have technical qualifications and who performed, by authority of the act of 1907, all the duties of the chief clerk, including those provided for in sections 20 and 36 of the act of January 12, 1895, and a secretary to the Public Printer, whose salary was \$2,500. Into this scheme of organization the act of March 4, 1911, inserted a "chief clerk" in the place of the "secretary to the Public Printer," prescribing no especial qualifications or duties to the office of chief clerk, giving the office no greater emoluments than had previously been given to the "secretary to the Public Printer," and leaving the office of "Deputy Public Printer" untouched, except so far as it is impliedly affected by the creation of the office of "chief clerk." If this legislation is to be given its full effect, as it should be, the result will be that the office of chief clerk will have attached to it only those functions which naturally inhere in that office, as such, and that the office of Deputy Public Printer will have taken from it only those ordinary functions appertaining to the office of chief clerk, and will be left with the extraordinary functions conferred by sections 20 and 36 of the act of January 12, 1895, upon the chief clerk and by the act of 1907 expressly devolved upon the Deputy Public Printer. It is significant that the qualifications essential to the proper performance of the duties prescribed by those sections are no longer required of the chief clerk, but *are* required of the Deputy Public Printer, and that fact, together with the amount of

salary provided for the respective offices and the names given to them, are proper matters for consideration in determining the intention of Congress. These support, to its full extent, the conclusion reached above.

Case of the Masters' Clerks, 1 Phill. Ch. 650.

I am, therefore, of the opinion, considering the various acts of Congress above referred to in connection with each other, that the Deputy Public Printer is the proper person to perform the duties and exercise the powers prescribed by sections 20 and 36 of the act of January 12, 1895, and that the chief clerk is confined to those duties and powers which ordinarily belong to that office, as such.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

---

CORPORATION TAX—RETURNS—COMPROMISE OF  
PENALTIES.

Every corporation subject to the tax under the corporation-tax act of August 5, 1909 (36 Stat. 114), must make returns whether or not its net income is large enough to make it liable for any amount of that tax. For a mere failure to make such returns in time, in the case of corporations with incomes so limited as not to be liable to the payment of any tax, liberal compromise is a course required by the spirit and policy of the laws of the United States.

DEPARTMENT OF JUSTICE,

*August 7, 1911.*

SIR: The Attorney General referred to me your request of the 1st instant for an opinion on the question of returns to be made by corporations under the corporation-tax law of 1909. (36 Stat. 112.) He has submitted in that connection the letter to you of July 31, 1911, by the Hon. F. S. Jackson, of Kansas, and also the letter to himself by Mr. Jackson of July 24, 1911. In his letter to the Attorney General, Mr. Jackson states his views at length and I have given them careful consideration. He presents two propositions, which he states as follows, viz:

“(1) That the plain and practical construction of the law is that corporations exempt from tax under this law on account of having a net income of less than \$5,000 are not

compelled to file an annual report; that corporations not required to report are not subject to the penalties of paragraph '8'; and

"(2) That the commissioner is without authority to compromise penalties under this act, unless such penalties are for the *nonpayment of taxes*."

In support of his first proposition Mr. Jackson says:

"The statute is founded on the war-tax law of 1898 and the income-tax law of 1894, and the text for the most part consists of a selection of language from both acts appropriate to the subject in hand. It was never claimed under either of these laws that every person and every corporation in the United States was compelled to submit an annual report to the collector of revenue to enable that officer to ascertain if the person or company was subject to the tax.

"The constructions of these laws was the plain and practical one, that when a person, firm, or corporation reached the amount of income taxable under the statute, such person, firm, or corporation was bound to report that fact to the proper assessing officer."

Under the law of 1894 (28 Stat. 553) the tax fell upon all individual incomes above \$4,000 and upon all the net income of business corporations.

The law in express terms required all persons having an income in excess of \$3,500 to make returns, and it explicitly required returns from all business corporations whether or not they had any net incomes during the year.

The matter of returns having been prescribed by the express terms of the law of 1894, governmental usage under the law can not help greatly to a construction of the law of 1909. So far, however, as the law and practice under it are pertinent, they support the requirement of returns from all corporations *subject* to the tax, whether or not for any particular year they are bound for the payment of any amount of tax.

The war-tax law of 1898 (30 Stat. 448) is more in point. This law provided:

"SEC. 27. That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for

transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

“And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation, or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return.”

The subject matter of the tax under this law was the designated business; the measure of the tax was the gross receipts of that business. No liability for any amount of tax was incurred by those subject to it, unless the volume of their business exceeded \$250,000 per year.

The analogy between this law and that of 1909 is very close, as in each case only those *subject to the tax* are required to make returns. The law of 1898 was construed by the Treasury Department to require returns from all who were engaged in the designated business. As to this, the circular letter issued by the department July 7, 1899, prescribed:

“*Returns, when and by whom to be made.*—Every person, firm, corporation, or company liable to tax under said section 27 will hereafter render a return, on Form 420 revised, of the gross amount of all receipts each month, and not later than the fifteenth day of the following month. When the returns made include the receipts of any branch or ‘constituent’ company engaged in the business of refin-



ing petroleum or sugar, or in operating any pipe line in the same or in another district, the name and location and the receipts of each such branch or constituent company should be stated in each return rendered.

*"The foregoing instructions will also apply to all such persons, firms, corporations, and companies where the gross receipts, during the period for which the return required by law is made, do not exceed the \$250,000 specially exempted from tax. A monthly return will also be required during the temporary suspension of business. Where, however, the business carried on has been permanently discontinued, that fact should be noted on the last return rendered."*

This usage of the Government requiring all those engaged in the designated business as being subject to the tax, to make returns, even though the volume of business was not large enough to make them liable for any amount of tax, was no doubt in the mind of Congress when enacting the law of 1909, and should be considered in construing that law.

The subject matter of taxation by the corporation-tax act is business carried on by corporations. The measure of the tax is the net income of that business ascertained as prescribed by the law. (Corporation Tax Cases, 220 U. S. 107.) Every business corporation, unless specifically excepted by designation of kind, is subject to the tax. Whether in any year it is bound for any amount of tax and what amount, if any, depends upon the amount of its net income for that year. This must be determined in the first instance by the Commissioner of Internal Revenue from the returns which are required to be made under the third paragraph of the law by "each of the corporations \* \* \* *subject* to the tax imposed by this section." The commissioner makes the assessment of the amount due on these returns. This assessment involves the exercise of judgment in the determination of what is net income under the law, and the determination of the amount of net income, if any, in excess of \$5,000.

As well permit the corporation to determine for itself how much tax it is liable for as permit it to so determine

whether it is liable for any amount. The law in every respect is to be administered by the officers of the law and not by those who are subject to it. Efficiency of administration would be difficult, and even impossible, if the corporations could determine, each for itself, whether or not they were liable for any amount of tax, and make or withhold returns accordingly.

The plain terms of the law are otherwise. Upon evidence adduced before the commissioner which in his opinion justifies the belief that a return is incorrect he may investigate the records of the company and examine witnesses, and upon the information thus acquired he may amend the return.

And "whenever any collector shall report to the Commissioner of Internal Revenue that any corporation \* \* \* has failed to make a return as required by law, \* \* \* the Commissioner of Internal Revenue \* \* \* for the purpose of making a return where none has been made, is hereby authorized" to examine the books and records of the company and take the testimony of witnesses, etc., and "upon the information so acquired the Commissioner of Internal Revenue may \* \* \* make a return where none has been made."

Under this provision of law it is manifest that the return which the commissioner may make after his examination is the same the company should have made without such examination. If the company, because its net income does not exceed \$5,000 for the year, needs not to make a return, then the commissioner has no right to examine it, for it has not "failed to make a return as required by law," and the commissioner would be a trespasser if he attempted an inquest of its affairs.

The right to examine where no return has been made is to enable the commissioner to determine, not whether the company is subject to the tax, but *whether or not* its income is such as to make it liable in some amount and in what amount. If upon the examination it transpires that the company's net income was less than \$5,000, the commissioner has done no wrong, for he has simply ascertained a

fact which it was his duty to ascertain. And inasmuch as he may ascertain this fact by examination, he may also ascertain it by the requirement of a return.

At the very beginning of administration under this law, the Treasury Department held (circular letter of March 29, 1910) that "every corporation, etc., not specifically enumerated as exempt shall make the return required by law, although its net income during the year may not have exceeded \$5,000."

This ruling is in accord with the previous usage of the Government, is required for the efficient administration of the law, and is amply justified by its terms.

Mr. Jackson's second proposition is that there can be no compromise in the case of failure of any corporation to make return on or before the 1st of March of any year.

Power to compromise cases or claims like those in question is found in sections 3229 and 3469 of the Revised Statutes. These sections are as follows:

"SEC. 3229 The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

"SEC. 3469. Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the

recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

Referring to section 3469, Mr. Jackson says:

"Every Attorney General and every court which has been called upon to pass on this section of the statutes has warned against the abuse and expressed doubt as to the construction asked for by the Executive officers referring to it as an authorization of the acts."

The authorities cited can not be said to support this statement.

The opinion of the Attorney General referred to in the twelfth volume of opinions, page 472, deals simply with the course of proceeding to be observed relative to the compromise of suits under the internal revenue law, and has no bearing upon the matter here under consideration.

The opinion of the Attorney General in 13 Op. p. 479, distinctly recognizes the authority to compromise claims of this general nature before judgment, by the Treasury Department alone before suit brought, and by the Treasury Department upon recommendation of the Attorney General after the institution of suit.

The opinion of the Attorney General in 23 Op. p. 507, does not limit the authority to compromise under section 3229 to claims for taxes. The Attorney General in that case had to deal with a suit brought against the United States, and he was discriminating simply between claims against the United States and claims by the United States. His holding was that suits against the United States could be compromised only by the Attorney General, but that claims by the United States under the internal-revenue laws might be compromised by the Treasury Department.

The opinion of Wayne MacVeagh, 27 Internal Revenue Record, page 334, is peculiarly in point, as it deals especially with the enforcement of severe penalties for purely technical violations of the internal-revenue law. Mr. MacVeagh says:

"I am also unable to imply from the provisions of the law under review any intention on the part of Congress

that the Secretary of the Treasury should be compelled to pursue litigations out of which the United States might undoubtedly realize smaller or greater sums of money, but which, in his judgment, ought not to be further prosecuted. As an illustration, if a person has been guilty of a technical violation of the internal-revenue laws, and, upon being informed of it, offers to compromise the case by the payment of the costs, and of any other sum justly due the Government, I see no evidence in these sections of the Revised Statutes, or in the laws from which they were drafted, that Congress intended to require that suit shall be commenced and prosecuted to extort the penalty intended only for wilful violators of the law; and the same considerations would apply to a great variety of cases, some of which must be of frequent occurrence in the administration of the Treasury Department, where the rigid enforcement of the technical legal rights of the Government would work manifest and plain injustice by taking from citizens money which, in the forum of conscience and good morals, they did not owe to it. It is not necessary to hold that the Secretary of the Treasury is, in the matter of compromises, a fountain of the compassion of the Government or an almoner of its charity. Those are considerations which do not belong to the administration of a business department. But, on the other hand, it is to my mind as clearly unnecessary to hold that the Secretary is bound to be an instrument of manifest injustice, and to ask himself only, in every case, this question: Will the prosecution of the claim in question probably bring to the Treasury more money than its compromise upon the terms proposed?

“I have, therefore, to advise you that while, in considering any compromise submitted to your judgment, you are not at liberty to act from motives merely of compassion or charity, you are at liberty, until Congress sees fit to limit your authority, to consider not only the pecuniary interests of the Treasury, but also general considerations of justice and equity and of public policy.”

And the Supreme Court, in *Dorsheimer v. United States*, 7 Wall. 166, also dealing with the compromise of claims under the internal-revenue laws, said:

"The power intrusted by law to the Secretary was not a judicial one, but one of *mercy*, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal." (Pp. 174, 175.)

In the cases with which we have now to deal the facts are well understood. Corporations subject, because of their kind and class, to the corporation-tax law, but from which, because their net income was less than \$5,000, no tax was due, failed to make returns on or before March 1 of the year. This failure was due to inadvertence or to a belief that no return was due because no tax was due. We are not dealing with the case of a fraudulent return or the fraudulent withholding of a return, but with cases in which there is not the slightest degree of moral turpitude. To these cases, the considerations so forcibly stated by Attorney General MacVeagh are peculiarly applicable.

Sections 3229 and 3469 are not restricted in terms, nor by any reasons of public policy to penalties for the nonpayment of taxes. Section 3229 authorizes the compromise of "any civil or criminal case arising under the internal-revenue laws." This is not limited by the further provision that in case of a compromise there shall be filed in the office of the commissioner a statement of the amount of tax assessed, etc. This requirement of filing a statement of the terms and conditions of the compromise is a mere matter of procedure to be followed in every case to which it is applicable. And section 3469 broadly authorizes the compromise of "any claims in favor of the United States" except those "arising under the postal laws."

To sum up, I believe the construction of the law by the Treasury Department as to the requirement of returns is a proper construction; and, further, that for a mere failure to make such returns in time, in the case of corporations

with incomes so limited as not to be liable to the payment of any tax, liberal compromise is a course required by the spirit and policy of the laws of the United States.

Very respectfully,

F. W. LEHMANN,  
*Solicitor General.*

Approved:

GEORGE. W. WICKERSHAM.

The PRESIDENT.

---

NONRESERVATION SCHOOLS—INDIAN COUNTRY—  
ATTORNEY GENERAL'S OPINION.

The question as to whether lands used for Indian schools, but not within Indian reservations, may be considered as Indian country for the purposes of the enforcement of the act of January 30, 1897 (29 Stat. 506), whereby it is made an offense to introduce liquor into the Indian country, is essentially judicial in character and is not one arising in the administration of the Interior Department, and therefore it would be improper for the Attorney General to give an official opinion thereon.

DEPARTMENT OF JUSTICE,  
*August 22, 1911.*

SIR: In your letter of August 14, 1911, the receipt of which I now have the honor to acknowledge, you state that "there are under the Commissioner of Indian Affairs a number of schools not situated on Indian reservations, and, therefore, called nonreservation schools;" that "these schools and the lands are for the use of the Indian pupils attending such schools, and are under the exclusive jurisdiction of the United States"; and that "it is necessary for the Indian Service officials to know whether such lands are Indian country, in order that proper means may be taken to afford protection to these children" from the evils of intoxicating liquors. You therefore ask my "opinion as to whether such lands may be considered as Indian country for the purposes of the enforcement of the act of January 30, 1897 (29 Stat. 506), whereby it is made an offense to introduce liquor into the Indian country."

Your request raises what is essentially a judicial question: The enforcement of the act of January 30, 1897,

must proceed through the courts. Whether or not a prosecution shall be commenced is a matter to be determined in any given case by the Attorney General. Your question therefore is not such as is considered to be one arising in the administration of your department, and I am obliged to reply that it would be improper for me to give you an official opinion upon it. (Rev. Stat. sec. 356; 26 Op. 631; 25 id. 97; 21 id. 509; 21 id. 369.)

From what has been said it also follows of course that if the facts of any instance of liquor selling that seem to require action to be taken are laid before me, it will become my duty to consider and decide whether proceedings shall be instituted as for a violation of the law.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

---

MEAT INSPECTION—LARD SUBSTITUTE—INTERSTATE  
TRANSPORTATION.

Lard substitute, composed of imported oleo stearin and vegetable oil, is subject to the inspection authorized under the meat-inspection provisions of the act of June 30, 1906 (34 Stat. 674), and the interstate transportation thereof is prohibited unless the provisions of said act are complied with.

The provisions of the above-mentioned act in relation to the inspection of "establishments" cover all "establishments" where meat food products are prepared, wherever the meat which goes into them may have come from.

DEPARTMENT OF JUSTICE,

*August 25, 1911.*

SIR: I beg to acknowledge the receipt of your letter of the 14th instant, in which you submit for my opinion the following question:

"Does the meat-inspection amendment (act of June 30, 1906, 34 Stat. 674) prohibit the transportation in interstate commerce of lard substitute, a compound of vegetable oils and of a definite and considerable quantity of imported oleo stearin, usually in the proportion of 80 per cent of the former and 20 per cent of the latter?"



On July 22, 1910 (28 Op. 369) Acting Attorney General Fowler rendered you an opinion to the effect that factories where lard substitute was made and the article itself were subject to inspection, under the above act, where the oleo stearin contained therein was of domestic manufacture. From this opinion it follows that the transportation interstate of lard substitute made of domestic oleo stearin is prohibited under the provisions of the said act unless so inspected. The difference between the question now put and that on which Mr. Fowler's opinion was predicated is this: The present question assumes that the oleo stearin entering into the composition of the lard substitute is not of domestic but of foreign origin, and imported into this country as oleo stearin; and I take it for granted your question further assumes, though it does not expressly state, that the establishment where the product is made and the product itself have not been inspected under the above act.

The general purpose of the act of June 30, 1906, is stated, in its opening language, to be that "of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food." The act is a comprehensive body of remedial legislation, passed to accomplish a great object, and its particular provisions should receive a liberal construction, so as not to hamper but to carry out its beneficent design. It is evident that factories where lard substitute is made from *imported* oleo stearin, and the lard substitute itself so made, are as much within the "purpose" of the act as above quoted, and are as likely to endanger the public health as factories where the lard substitute is made from *domestic* stearin, or the lard substitute itself so made. A construction which would exclude one from the operation of the act, but include the other, should not be made unless the language of the act compels it.

The portion of the act relating to the inspection of meat-food products (which term includes "lard substitute") is the so-called paragraph 4, and reads:

"That for the purposes hereinbefore set forth" (that is, for the purpose of preventing the use in interstate commerce

of unwholesome meat products) "the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of *all* meat-food products prepared for interstate or foreign commerce in *any* slaughtering, meat canning, salting, packing, rendering, or similar establishment \* \* \*; and said inspectors shall mark, stamp, tag, or label as 'inspected and passed' *all such* products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat-food products unsound, unhealthful, unwholesome, or unfit for human food \* \* \*." (The italics are mine.)

A similar provision is then made for the reverse case. This language is unqualified. It applies, by its terms, not simply to meat food products manufactured from domestic or inspected meat or meat products, but to *all* meat food products. The point aimed at by this language is, not whether such products be made from imported or domestic meat or meat constituents, but whether, as the "purpose" of the act foreshadowed, such products be "unsound, unhealthful, unwholesome, or unfit for human food." What reason can be given for limiting the language so as to exclude a case clearly within the evil for the correction of which the act was passed?

It is claimed that, looking to all the provisions of the act, the "meat food products" spoken of therein, are those and those only which are produced from cattle, sheep, etc., subject to inspection under the act. This construction, however, while possible, is too narrow and technical for such a broad statute, having such a large design. A much better construction, because more in accordance with the spirit and general intent of the legislation, is, that the qualifying words "thereof" and "therefrom" attached to the term "meat food products" in the act refer merely to the kind of animals from which the meat food products are made, and not to the origin or previous experience of such animals. Also it must be noticed that the word "thereof" is not contained in the paragraph 4 above quoted. In my judgement therefore, the language of this act is broad enough to include "meat food products," e. g., lard substitute, which are made from an imported meat constituent, e. g., oleo

stearin, with the added "ingredient" of a vegetable oil; and such lard substitute is therefore subject to inspection under the terms of the act.

The provisions of the act in relation to the inspection of "establishments" where meat food products are prepared, viz, paragraphs 6 and 19, have already been fully examined in the former opinion above referred to. In my judgment those provisions cover all "establishments" where meat food products are prepared, wherever the meat which goes into them may have come from. The act can not be confined to an inspection only of those "establishments" where the entire process is carried on from slaughtering the cattle to turning out the finished product. It applies also to any "establishment" where any one of the steps toward the final result is taken; and, above all, it applies to all "establishments" where the finished product, the thing which is ready for consumption by the public, is prepared.

If, then, lard substitute, composed of imported oleo stearin and vegetable oil, is subject to inspection under the act of June 30, 1906, together with the "establishment" where it is made, it follows, necessarily, that it is prohibited from interstate transportation under paragraph 8 of the act, and from sale under paragraph 17 of the act, unless, in its manufacture, the provisions of the act are complied with, and your question must be answered in the affirmative.

It is claimed that this view of the operation of the act is contrary to the opinion of Mr. Moody, rendered you September 27, 1906. (26 Op. 50.) Mr. Moody there held that the prohibition upon interstate transportation, to which you refer, contained in the act of June 30, 1906, did not apply to meat and meat-food products imported from foreign countries. Therefore it follows from that opinion that oleo stearin imported from a foreign country is not within the scope of the provisions of this act. It does not, however, in the least, follow that where such oleo stearin is, in fact, transported in interstate commerce, sold to a manufacturer, and by him, in his "establishment," converted into lard substitute, an admitted meat-food product, the act does not apply to such manufacture and to the

product thereby resulting. Assume that the act only applies to domestic slaughtering, rendering, and manufacture. Still, the lard substitute produced in the way outlined above is a domestic meat-food product, no matter where its constituents may have come from. It is the "establishment" where *it* is made, which is subject to inspection under the act, not the factory where its imported constituents were made; and it is the *lard substitute* so produced in a domestic "establishment" which is subject to inspection under the act and not *oleo stearin*, its imported constituent. This opinion, therefore, does not trench in the least on that of Mr. Moody. Nor is it perceived how the adoption of the opinion herein stated would have the effect to prevent the use of imported oleo stearin in the manufacture of lard substitute. An inspection of the oleo stearin at the port of entry is not contemplated. It may be imported and sold as freely as before, and it may be used, as before, in the manufacture of lard substitute, provided only the manufacturer of such lard substitute complies with the provisions of the act of June 30, 1906.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF AGRICULTURE.

---

APPOINTMENT OF MINING TRUSTEE FOR THE CHOCTAW NATION.

Upon the expiration of the term for which a mining trustee for the Choctaw Nation was appointed, it is entirely competent that a new appointment be made.

DEPARTMENT OF JUSTICE,

*August 31, 1911.*

SIR: I have your letter of July 28, 1911, requesting my opinion as to whether a new appointment should be made to the office of mining trustee for the Choctaw Nation, or whether the present incumbent is entitled to continue in that position.

You refer to the legislation relating to the dissolution of the tribal relations of the Five Civilized Tribes, and

providing for the final disposition of their affairs contained in the act of June 28, 1898 (30 Stat. 495), the joint resolution of March 2, 1906 (34 Stat. 822), and the act of April 26, 1906 (34 Stat. 137), the material portions of which are given below.

Section 29 of the act of June 28, 1898, *supra*, confirmed an agreement made by the Commissioners to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians. That agreement provided that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations should remain and be the common property of the members of the said tribes, so that each and every member should have an equal and undivided interest in the whole and—

“\* \* \* That such coal and asphalt mines as are now in operation, and all others which may hereafter be leased and operated, shall be under the supervision and control of two trustees, who shall be appointed by the President of the United States, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the Governor of the Chickasaw Nation, who shall be a Chickasaw by blood, whose term shall be for two years; after which the term of appointees shall be four years. Said trustees, or either of them, may, at any time, be removed by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties, under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their respective nations, each of whom shall make full report of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary.”

An additional provision respecting the tribal governments was contained in this agreement as follows:

“It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal

governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

The joint resolution of March 2, 1906, *supra*, provided:

"\* \* \* That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Section 28 of the act of April 26, 1906, provides:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

It is stated in your letter that after the enactment of the legislation above cited, a question arose as to the right of the then principal chief of the Choctaw Nation and the members of the council to continue to act in their respective capacities without reelection; that the Assistant Attorney General for the Interior Department rendered an opinion under date of January 28, 1907, in which, after discussing the situation, it was said:

"\* \* \* The conclusion is irresistible; that it was the form of government, which was continued in full force and effect, and not the term of office of the person then acting in any official capacity for the tribes."

It further appears that this opinion was approved by the Secretary of the Interior on the day on which it was rendered, but on February 11 following he revoked and canceled that approval "to give the matter further consideration"; that the question was not again submitted to the law officer of the Interior Department, but in a letter dated September 5, 1907, to the Commissioner of Indian Affairs, relative to a proposed election of tribal officers, the Acting Secretary of the Interior said: "Without entering into any discussion as to the possible construction of section 28 of the act of April 26, 1906, it is believed that Congress thereby intended that the existing status of the Five Civilized Tribes, so far as their officials were concerned, was not to be thereby disturbed during the short remaining period of tribal existence."

You state that no tribal elections have been held since that time, and the various persons then holding tribal offices have been recognized as entitled thereto; that the term of the Choctaw mining trustee, holding office at the time of the passage of the act of April 26, 1906, expired in November that year; that subsequently Secretary Garfield appointed the incumbent for another term of four years, which term has now expired, and the matter of appointment of a successor is presented.

The act of 1898, the joint resolution of March 2, 1906, and the act of April 26 following, relating, as they do, to the same subject matter, must be read together, and it is but

fair to assume that the terms "tribal existence" and "tribal governments" used in one of these acts have the same meaning when used in the others, as no contrary intention plainly appears in the context.

Now it is in the agreement embodied in the act of 1898 that there is made the first of these provisions for a continuance of the "tribal governments," and that is the identical agreement which establishes the two trusteeships. It provides in one portion that the "tribal governments" shall continue for a period of eight years, etc., and in another portion that the trustees shall be appointed, one for a term of two years and the other for a term of four years, and that as those terms expire "the term of appointees shall be four years." I regard this latter provision as quite inconsistent with the theory that Congress, or the persons who signed the agreement, intended that either the first appointees or their immediate successors should hold until the expiration of the eight-year period or beyond it. If such had been the intention it would have been expressed in apt language and not left to be gleaned from a destruction of the language that was actually used, brought about through an inference from a different and not necessarily conflicting portion of the agreement. One of the first duties in construction is to concede meaning to the terms employed in the writing, especially when those terms are free from uncertainty in themselves, and most especially when, as in this instance, they are terms of definite legal significance. It is important, of course, to harmonize the writing as a whole, but this should be accomplished by allowing that which is clear to shed light upon that which is obscure rather than by distorting the direct to fit and sustain a construction of the ambiguous. I think that the provision for the terms of the trustees is more apt to assist than to be assisted by the provision for the continuance of the "tribal governments." If by the latter it was intended not only to continue the tribal offices but also to continue the individual officeholders in office, then the trusteeships and trustees are not to be regarded as appertaining to the "tribal governments."



If on the other hand the trusteeships are to be regarded as part of the tribal governments, then the expression "tribal governments" means the framework and machinery of tribal government, including the offices, with the respective powers, duties, and functions belonging thereto, but not the individuals who chanced to occupy the offices. The occasion would not justify me in attempting to choose between the horns of this dilemma.

I am of the opinion that by extending the tribal existence and existing tribal governments, Congress did not intend to extend the terms of individual mining trustees, and that upon the expiration of the term for which an incumbent was appointed it is entirely competent that a new appointment be made.

Very respectfully,

ERNEST KNAEBEL,  
*Acting Attorney General.*

The SECRETARY OF THE INTERIOR.

---

PURCHASE AND CONSTRUCTION OF A CANAL AND LOCKS  
AROUND WILLAMETTE FALLS, OREG.—INSUFFICIENT AP-  
PROPRIATION.

In the purchase and construction of a canal and locks around Willamette Falls, at Oregon City, Oreg., provided for by the river and harbor act of June 25, 1910 (36 Stat. 630), the appropriation authorized may be expended in the prosecution of the work, notwithstanding the total cost may exceed the amount of the appropriation.

DEPARTMENT OF JUSTICE,  
*September 2, 1911.*

SIR: I beg to acknowledge receipt of your note of the 1st instant requesting an opinion as to the propriety of doing certain preliminary work in the purchase and construction of a canal and locks around Willamette Falls, at Oregon City, Oreg.

It appears that this work was provided for by the river and harbor act of June 25, 1910 (36 Stat. 630, 664, 668), the provisions of which, in so far as they bear upon the matter in hand, are as follows:

"Improving Willamette River, Oregon: For the purchase of the existing canal and locks around Willamette Falls at Oregon City, Oregon, or for the purchase of the necessary lands and the construction of a new canal and locks, in the discretion of the Secretary of War in accordance with the report submitted in House Document Numbered Two hundred and two, Fifty-sixth Congress, first session, three hundred thousand dollars: *Provided*, That no part of this appropriation shall be expended, except for the acquisition of the necessary lands and rights of way and for such antecedent surveys and preliminary work as may be necessary in this connection, until the State of Oregon shall appropriate for the aforesaid purpose a like amount; and the purchase of the existing canal and locks, or the actual construction of a new canal and locks, shall not be undertaken until the Secretary of War shall be satisfied that the State of Oregon will deposit the said amount in the Treasury of the United States in such sums and at such times as he may require: *Provided further*, That the Treasurer of the United States is hereby authorized to receive from the State of Oregon any and all sums of money that have been or may hereafter be appropriated by said State for the purpose herein set forth; and when so received the said sums are hereby appropriated for said purpose to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers.

\* \* \* \* \*

"SEC. 2. Whenever the appropriations made by Congress for river and harbor works can be more advantageously expended by combining in one contract two or more works, such combinations shall be made; and whenever the appropriations made, or authorized to be made, for the completion of any such work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated, or authorized, to the prosecution of such work."

I am informed that the State of Oregon has made the appropriation of \$300,000 required of it, so that the total

appropriation for this work is brought up to \$600,000. This sum, however, is not sufficient to complete the work fully, according to the estimates of the engineers. In this state of affairs your question is—

“Whether the fact that the total sum (\$600,000) appropriated and made available by the act of June 25, 1910, will prove insufficient for the completion of the work authorized by Congress, is a bar to commencing operations and applying the available funds to the prosecution of the preliminary work as recommended by the Chief of Engineers in his letter of August 26, 1911.”

In my opinion the provisions of the act quoted above show so clearly that the appropriation authorized may be expended in the prosecution of the work, as far as it will go, whether the total cost exceed the amount of the appropriation or not as not to justify any extended discussion. Even without the aid of section 2 quoted above the same result would follow, since the sum of \$600,000, appropriated in section 1, is not expressly constituted a limit to the amount to be expended upon the improvement. In the opinion of the Attorney General of November 30, 1910 (28 Op. 477), in regard to battleship *No. 34*, and in the opinion of the Comptroller to the Secretary of War of May 14, 1903 (9 Comp. Dec. 638), the appropriation acts under consideration expressly limited the cost of the work to a certain specific sum. When no such limitation is made in the act, no provision of general law and no reason prevents the use of the appropriation so far as it will go. This conclusion is fortified and rendered entirely certain by the language of section 2 quoted above, which expressly provides that the appropriation may be used so far as it will go, whether it is sufficient to complete the job or not.

Your question, therefore, must receive a negative answer.

Respectfully,

J. A. FOWLER,  
*Acting Attorney General.*

The SECRETARY OF WAR.

SALES OF TIMBER FROM UNALLOTTED LANDS OF INDIAN  
RESERVATION.

Sales of timber from unallotted lands of the White Mountain Apache Indian Reservation, which were included in the Sitgreaves National Forest by the President's proclamation of March 2, 1909 (35 Stat. 2236), should be conducted by the Secretary of the Interior and the purchase money should be placed to the credit of the Indians.

DEPARTMENT OF JUSTICE,

*September 5, 1911.*

SIR: Your letter of July 11, 1911, submitted for an opinion the following questions:

"1. Has the Secretary of Agriculture, independently of the Department of the Interior, authority to make sales of timber from unallotted lands of the White Mountain Apache Indian Reservation, which were included in the Sitgreaves National Forest by the President's proclamation of March 2, 1909?

"2. If this department has such authority, should the proceeds of such sales be deposited in the general funds of the Treasury, or should they be placed to the credit of the Indians?"

The questions result from an informal application pending with the Forester for the purchase of a large amount of timber, all of which stands within the general limits of the forest as defined by the proclamation, but part of which is also situate upon included lands of the Indian reservation.

The proclamation, after proclaiming that the Indian lands are added to the forest, proceeds to declare:

"Such National Forest so enlarged shall, except as hereinafter provided, be subject to all the laws affecting National Forests including the mineral land laws of the United States; *Provided*, that, nothing herein shall, for the term of twenty-five years from the date hereof, operate to terminate or abridge the rights of the Secretary of the Interior and of the Commissioner of Indian Affairs, under existing laws, to allot to individual Indians any of such of the above-described lands as were included in the said White Mountain Apache Indian Reservation by the said Executive Orders modified as aforesaid; to use any of such

lands or the timber thereon for Agency, school, or other tribal purposes; to permit the use of any of such lands for grazing purposes; to permit the free use by individual Indians of timber and stone from any of said lands necessary for domestic use upon their allotments; to dispose of the proceeds arising from grazing as provided for by law for other Indian funds; and to dispose of the dead timber standing or fallen upon such lands; *Provided further*, that said powers and rights of the Secretary of the Interior and Commissioner of Indian Affairs or permittees under or through them or either of them, and of individual Indians, except as to allotments to such Indians, shall be subject to such rules and regulations as the Secretary of Agriculture may from time to time prescribe for the protection of the National Forest; and said powers and rights shall not be construed to apply to any land except such parts of said White Mountain Apache Indian Reservation as are included in the Forest by this proclamation, and all said powers and rights except the rights of individual Indians and their heirs to hold and enjoy their allotments, shall cease and determine twenty-five years after the date hereof, and thereafter the occupancy and use of the unallotted parts of said lands shall in all respects be subject to the laws governing National Forests.

"The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public-land laws or reserved or used for Indian Agency, school, or church purposes, or reserved for any public purpose other than for Indian occupancy and use under such Executive Orders, be subject to, and shall not interfere with, or defeat legal rights under such appropriation, or prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained, or such reservation remains in force." (35 Stat. 2236.)

The Indian reservation here affected is what is known as an Executive order reservation since it was created neither by a treaty with the Indians nor by act of Congress, but by an order of the President. The question whether the President is authorized to create such reservations has

received discussion in the opinions of the Attorney General (17 Op. 258; 14 id. 181) and, in actual practice, the existence of such a power has been very frequently assumed; but it should be pointed out that neither the power of the Executive to create, nor his power to revoke (no treaty or law opposing), is regarded as necessarily involved in the answering of the questions you have propounded. In this instance the creative order was made November 9, 1871. Other orders followed, modifying the boundaries mainly by reduction of the original area, the last of them, bearing date March 31, 1877 (1 Kappler's Laws and Treaties, pp. 810 et seq.). No legislation earlier than the general allotment act of February 8, 1887 (24 Stat. 388), has come to my notice which might be regarded as evincing a congressional recognition or adoption of this reservation. That act, however, provided, by its first section:

"That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows."

Of this law the Supreme Court has said, in a case in which the validity of this very reservation, though not questioned by the parties, appears to have been necessarily involved:

"The necessary effect of this legislative recognition was to confirm the Executive order, and establish beyond challenge the Indian title to this reservation." (In re Wilson, 140 U. S. 575, 577.)

The court there expressly held that the district court of the Territory of Arizona, sitting for the purpose of enforcing the Federal criminal laws, was vested with the juris-



diction to try and sentence the petitioner, a negro, for the murder of another negro, within the reservation, as the offense was included by section 2145 of the Revised Statutes, providing for the extension of certain general penal laws of the United States "to the Indian country." Justice Brewer observed in the opinion, page 578:

"This Indian reservation is a part of the Indian country within the meaning of that section." (*Bates v. Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556.)

By reference to the two authorities thus cited it will be found that "Indian country" (the definition of which occurs in the act of June 30, 1834, 4 Stat. 729) means nowadays all country within the United States, and not within the jurisdiction of any State "*to which the Indian title has not been extinguished.*" (See *Ex parte Crow Dog*, *supra*, p. 561.)

To be "Indian country" it is not essential that a given area should be within an Indian reservation (*ibid.*); it is of importance, however, to note that in the view of the Supreme Court, as expressed in *Wilson's case*, the reservation was a valid reservation—recognized indeed by Congress itself—of land subject to the Indian title. It was from the beginning, or had grown to be, something more than a mere refuge for the tribes collected there; the Indians were interested in the land. And this conception of an interest, not assertable, if you please, against the Government, but still an interest recognized by Congress as extending throughout the entire reservation (General allotment act of Feb. 8, 1887, 24 Stat. 388, sec. 1, sec. 5 third proviso), is confirmed and strengthened by subsequent acts of Congress relating to this reservation exclusively.

Thus by the act of February 20, 1893 (27 Stat. 469), it was provided that the money proceeds (over fees and survey expenses) to accrue from the sale of the lands which it took from the reservation and restored to the public domain should be held in trust "for the sole use and benefit of the tribes of Indians now located upon said reservation," and be expended for the best interests of

those tribes. While this act, according to the declaration of its fifth section, was not to be construed as recognizing "title or ownership" in the Indians, it contained no denial of their interest in the lands, but provided, as we have seen, a way for compensation for the land of which it deprived them.

By the Indian appropriation act of March 2, 1895, the Secretary of the Interior was authorized to negotiate with the Indians of this reservation "for the cession or relinquishment to the United States of the lands embracing the coal fields," it being provided that any agreement made should be submitted to Congress for its action. (28 Stat. 894.) An agreement was made and submitted and received the approval of Congress. (Act of June 10, 1896, 29 Stat. 358 et seq.) The agreement is set forth in the statute. It contains four articles. By Article I the Indians, that is, the Apache, Mohave, and Yuma Indians residing on the reservation, cede, grant, and relinquish to the United States all their right, title, and claim to a certain described portion of the reservation. By Article II the United States in consideration of the cession agrees:

"To place in the Treasury of the United States to the credit and for the sole benefit of the said Apache, Mohave, and Yuma Indians and to account therefor annually, to them through their agent, the net proceeds accruing from the disposal of such coal and mineral lands, lying within the ceded territory, under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike to each man, woman, and child of the tribes now living upon and entitled to the privileges of the said reservation."

Article III provides for a survey, "for the purpose of segregating the ceded land from the diminished reservation," and that the cost shall be paid from the proceeds of the ceded lands.

A later enactment restored another small tract of this reservation to the public domain, for sale under the mining laws. Although the area was but 231 acres, Congress



244 *Sales of Timber from Land of Indian Reservation.*

nevertheless provided that the proceeds of sale, after deducting the expenses of surveying, should be held in trust for the tribes of Indians on the reservation, to be expended by the Commissioner of Indian Affairs under the direction and control of the Secretary of the Interior, for the best interests of those tribes. (Act of Mar. 2, 1901, 31 Stat. 952.)

From the character of the legislation so passed in review, there can be little doubt that in the mind and policy of Congress this reservation was not only a valid reservation set apart for the occupancy and enjoyment of the various tribes which have inhabited it from the beginning, and subject to be allotted in part to the individual members composing them, but was also devoted to them in its entirety in such a sense that no part of it should be taken from them without their consent or giving something in return by way of compensation. And, of course, no distinction here is to be taken between the land and the timber growing upon it and, presumably, constituting its chief value. (*U. S. v. Cook*, 19 Wall. 591.)

The act of June 25, 1910 (36 Stat. 855, sec. 7), passed since the proclamation was issued, still further and more definitely extends and declares the same policy as to all such reservations in general. It provides:

"That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin."

Has the proclamation forestalled the application of this law to the particular reservation in question?

While this proclamation, generally speaking, contemplates the ultimate absorption by the forest reservation of all the surplus Indian land, it clearly intends to postpone that result for a period of 25 years. This means that the partial extinguishment of the Indian reservation, which would be the necessary concomitant of such a merger, is

intended to be postponed for the same period of time. An Indian reservation, without regard to the method of its creation, is in a proper sense a special instrumentality of the Federal Government. It is designed to fulfill a particular purpose, or complex of purposes, and has definite, well-defined legal incidents which have arisen partly from the nature of those purposes and partly from the enactment by Congress of a body of laws relating to Indian reservations and to nothing else. *Mutatis mutandis* this is all true of forest reservations also. Legally it is impossible for the Executive without authority from Congress, and practically it would result in many perplexities, to bring into being a hybrid reservation partaking in some ways of the incidents and purposes of an Indian reservation and in other ways of the incidents and purposes of a forest reservation, but lacking the full attributes of either. An opinion rendered to the Secretary of the Interior by Mr. Attorney General Garland March 7, 1887, seems quite apposite here. The question was as to the right of the Secretary of the Interior to consent to the construction of a ditch by a mining company within an Indian reservation. Mr. Garland (18 Op. 563) said:

“If the reservation is not authorized by law, on disposing the Indians by the Government the land would be subject to the general laws applicable to the public domain; but while Indians in a reservation made by order of the President are organized in tribes or bands, and as such maintain a quasi national character; are placed under the charge of an agent appointed by the Government according to law; and are in the actual peaceable possession, the laws applicable to Indian reservations must be recognized as applicable to them.

“Attorney General Bevens, in an opinion reported in 16 Opinions, page 553 (in which I concur), maintained that the United States had power to grant such privileges as are asked for by the petitioner in this case; but the power to make the grant exists only in Congress, and without action by Congress it can not be lawfully exercised. The conclusion then is, in the absence of Congressional action,

the right should not be granted to the petitioners in this case to enter upon the Lemhi Reservation, unless the Indians be lawfully removed or dispossessed." (See also 18 Op. 236.)

Inasmuch as the proclamation does not intend to destroy the status of the Indian lands within the forest as lands appertaining to an Indian reservation, they remain subject to the operation of the laws which apply to Indian reservations in general, and certain broad expressions in the wording of the proclamation which standing apart might suggest a different purpose should be restrained to conform with the presumed intention of the President to accomplish nothing other than a legal result.

The laws which authorize the Secretary of Agriculture to make sales of timber refer to the timber on the forest reservations. (Act of June 4, 1897, 30 Stat. 35; act of Feb. 1, 1905, 33 Stat. 628; act of May 23, 1908, 35 Stat. 268.) The money proceeds of such sales are required to be covered into the Treasury of the United States as a miscellaneous receipt. Twenty-five per cent of all such revenue ultimately goes to the States and Territories within which the reservations are situate, but none of it goes to the Indians. (Act of Mar. 4, 1907, 34 Stat. 1270; act of May 23, 1908, 35 Stat. 260.) The law which authorizes the selling of timber from Indian reservations and prescribes the application of the purchase money, is the act of June 25, 1910 (36 Stat. 855), section 7, which I have already set forth.

This, in my opinion, is the law which must govern any sale of timber from the Indian lands embraced by the proclamation. The sale should be conducted by the Secretary of the Interior, and the purchase money should be placed to the credit of the Indians, as that law provides.

These conclusions are stated the more confidently because they are in accord with the views entertained by both of the departments affected.

Very respectfully,

ERNEST KNAEBEL,  
*Acting Attorney General.*

**THE SECRETARY OF AGRICULTURE.**

TRANSFER OF DUTIES OF DISBURSING CLERK OF THE  
BUREAU OF THE CENSUS TO DISBURSING CLERK OF THE  
DEPARTMENT OF COMMERCE AND LABOR.

The duties formerly performed by the disbursing clerk of the Bureau of the Census can not be transferred to the disbursing clerk of the Department of Commerce and Labor consistent with law within the meaning of section 161 of the Revised Statutes.

DEPARTMENT OF JUSTICE,  
*September 9, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, in which you state that the position of disbursing clerk of the Bureau of the Census has been vacated as a result of the transfer of the incumbent thereof to the position of disbursing clerk of the Department of Commerce and Labor, and that it is your desire, in the interest of increased efficiency in the department, to leave vacant the position of disbursing clerk of the Bureau of the Census, provided the disbursing clerk of the Department of Commerce and Labor may legally perform the duties of the former position in addition to his own.

You therefore request my opinion as to "whether under the law the department has authority to transfer the duties formerly performed by the disbursing clerk of the Bureau of the Census to the disbursing clerk of the Department of Commerce and Labor;" and if so, whether the bond of the disbursing clerk of the Department of Commerce and Labor would be liable for funds advanced to him for the support of the Bureau of the Census.

Apparently the only provision of law from which you may derive authority, if at all, to make the arrangement suggested is section 161 of the Revised Statutes. That section is as follows:

"SEC. 161. The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his Department, the conduct of its officers and clerks, *the distribution and performance of its business*, and the custody, use, and preservation of the records, papers, and property appertaining to it."

The act of Congress, approved March 6, 1902, entitled "An act to provide for a permanent Census Office" (32 Stat. 51), provides:

"SEC. 4. That there shall be in the Census Office, to be appointed by the Director thereof, with the approval of the head of the Department to which the said Census Office is attached, \* \* \* a disbursing clerk, who shall also act as appointment clerk, at an annual salary of two thousand five hundred dollars. \* \* \* The disbursing clerk herein provided for shall, before entering upon his duties, give bond to the Secretary of the Treasury in the sum of twenty-five thousand dollars, which bond shall be conditioned that the said officer shall render a true and faithful account to the proper accounting officers of the Treasury quarter yearly of all moneys and properties which shall be received by him by virtue of his office, with surety, to be approved by the Solicitor of the Treasury. Such bond shall be filed in the office of the Secretary of the Treasury, to be by him put in suit upon any breach of the conditions thereof."

By the act providing for the Thirteenth Census (36 Stat. 1, 2) the disbursing clerk of the Census Office is relieved of the appointment duties during the three years known as the decennial census period, beginning July 1, 1909; his salary is increased to \$2,785 per annum during such period and it is provided that at the beginning of the decennial census period he shall give additional bond in the sum of \$100,000, conditioned upon the faithful accounting for all moneys and properties received by him by virtue of his office during the said decennial census period.

The act of February 14, 1903, entitled "An act to establish the Department of Commerce and Labor" (32 Stat. 825), merely provides that there shall be in said department "a disbursing clerk," without any expression as to the extent of his duties, and by the same act it is also provided that "the Census Office, and all that pertains to the same, be, and the same hereby is, transferred from the Department of the Interior to the Department of Commerce and Labor, to remain henceforth under the jurisdiction of the latter."

It will be observed that the Census Office, as transferred to your department, carried with it the position of disbursing clerk, which position, I assume, has since been regularly appropriated for by Congress. In my opinion, therefore, such position must be regarded as essential to the Census Office organization until Congress otherwise provides, and it would be "inconsistent with law," within the meaning of section 161 of the Revised Statutes, for you to make the proposed change.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE SECRETARY OF COMMERCE AND LABOR.

---

RETIREMENT OF EXPERT ACCOUNTANT FOR THE  
INSPECTOR GENERAL'S DEPARTMENT.

An expert accountant in the Inspector General's Department is not entitled to be placed on the retired list on the ground that he has reached the age of 64 years because he is not an officer of the Army within the meaning of the statutes of the United States conferring the privilege of retirement.

DEPARTMENT OF JUSTICE,  
*September 13, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th ultimo, inclosing an application of Mr. William T. Kent, the expert accountant for the Inspector General's Department, to be placed upon the retired list, on the ground that he has reached the age of 64 years, and requesting an opinion upon his right to be so retired.

The statutes of the United States giving and regulating the right of retirement of officers of the Army, pertinent to this inquiry, are the following:

Revised Statutes:

"SEC. 1243. When an officer has served forty consecutive years as a commissioned officer, he shall, if he makes application therefor to the President, be retired from active service and placed upon the retired list. When an officer has been thirty years in service, he may, upon his own application, in the discretion of the President, be so retired, and placed upon the retired list.

250 *Expert Accountant in Inspector General's Department.*

"SEC. 1244. When an officer has served forty-five years as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the President."

Act of June 18, 1878 (20 Stat. 150):

"That on and after the passage of this act, all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the Armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men in computing their service for longevity pay and retirement. \* \* \*"

Act of June 30, 1882 (c. 254, 22 Stat. 118):

"\* \* \* *And provided further*, That on and after the passage of this act when an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list, and, when an officer is sixty-four years of age, he shall be retired from active service and placed on the retired list; \* \* \* and no act now in force shall be so construed as to limit or restrict the retirement of officers as herein provided for."

Act of March 3, 1883 (22 Stat. 457):

"\* \* \* That nothing contained in the act making appropriations \* \* \* shall be so construed as to prevent, limit, or restrict retirements from active service in the Army, as authorized by law in force at the date of the approval of said act, retirement under the provisions of said act of June thirtieth, eighteen hundred and eighty-two, being in addition to those theretofore authorized by law. \* \* \*"

(Compare act of February 14, 1885 (23 Stat. 305), as amended in 1890 (26 Stat. 504), providing for the retirement of enlisted men.)

Mr. Kent's application is based, and can only be based, upon the provisions of the act of June 30, 1882, and the question of his right to retirement, therefore, depends upon

the proper construction of that act, read in connection with all the other statutes relating to the same subject.

At the outset, it can not be denied that the privileges conferred by these statutes are confined to officers of the Army, and Mr. Kent must bring himself within that class before he can claim the advantage of those privileges. That Mr. Kent, being appointed "expert accountant for the Inspector General's Department" by the Secretary of War, under a general provision of law (act of June 13, 1890, 26 Stat. 148, 151; act of Feb. 24, 1891, 26 Stat. 770, 773; and especially act of July 16, 1892, 27 Stat. 176) to perform functions defined by law (act of Apr. 20, 1874, c. 117, 18 Stat. 33) and by regulations (Army Regulations, 1904, arts. 900, 909, 910), is an officer of the United States (*United States v. Maurice*, 2 Brock. 96; *United States v. Germaine*, 99 U. S. 508) is not enough. It does not follow that, though an officer of the United States, he is also an officer "of the Army." It is clear that an officer of the United States may have functions and duties relating solely to the Army, and may be paid entirely by appropriations for the Army, and yet not be "of the Army." (*Brown's Case*, 32 Ct. Cl. 379, 386, 387, 388, *Huse's Case*, 43 *ibid.*, 24; *United States v. Burns*, 12 Wall. 252; *United States v. La Tourrette*, 151 U. S. 572, 576; 27 Op. 468, 471, 472, 475.)

The test to distinguish between a civil officer whose duties lie in the War Department and an officer of the Army is that laid down by Attorney General Devens in 16 Op. 13 (and see *United States v. Tyler*, 105 U. S. 244, 245), viz, that officers of the Army are those officers who are a part of "the military establishment" created by the general acts of Congress organizing the "Army of the United States" and defining what it shall "consist of," and, as such, are subject to the rules and articles of war. Prior to the passage of the act of February 2, 1901 (c. 192, 31 Stat. 748), the organization of the Army was provided for by Revised Statutes 1094 and the following sections. Neither in the general section 1094 nor in the section dealing specifically with the Inspector General's Department (sec. 1131) is there anything which can be construed to bring



the expert accountant in the Inspector General's Department within the "establishment" thereby created. Nor is there anything different in this respect in the act of February 2, 1901 (*supra*).

These acts, in so far as officers are concerned, provide for a graded, formal organization, the persons in which have rank and are in line of promotion to a higher, wear uniforms as the badge of that rank, are subject to military discipline, and to orders issued to enforce that discipline, and have acquired, to speak generally, the status of soldiers, as defined in *In re Grimley* (137 U. S. 147), in addition to their status of citizens or their status of officers of the United States. It would be stretching these statutes beyond their scope to include the expert accountant within the military establishment thereby created.

The appropriation acts for the Army always follow the scheme of organization laid down in the statutes above referred to, and, specifically, in relation to the Inspector General's Department they provide "for pay of the officers in the Inspector General's Department as now authorized and provided by law," while the provision for the expert accountant is always contained under the heading entitled "Miscellaneous."

The sections of the Revised Statutes stating the effect of retirement (secs. 1254, 1255, 1256, 1257) and the method of fixing the pay of retired officers (sec. 1274) are equally conclusive against the claim of the expert accountant. He has no "actual rank" within section 1254. He has no "command" and is not in "the line of promotion" within section 1255. He has no "uniform of the rank;" he has never been "borne on the Army Register;" and, as I am informed by the War Department, he is not, in time of peace, and never has been, "subject to the rules and articles of war," nor "to trial by general court-martial," within section 1256. There is no way of fixing his pay on retirement, as he has no "rank" to be used as a basis of computation within section 1274. (See also *Gen. Wood's case* (15 C. Cls. 151) and *R. S.*, sec. 1262, construed in *United States v. Tyler*, *supra*.) Finally, he has never been treated by the War Department, in orders or regu-

lations, or in any other way, as an officer "of the Army." As Chief Justice Nott said in Brown's case (*supra*):

"The status of such an officer, the department or place to which he properly belongs, is something which can be much better determined by the legislative and executive branches of the Government, than by the judicial."

Furthermore, there appears to be sufficient reason why the retirement statutes should not be carried beyond their terms by construction. Congress has provided, by the act of February 24, 1899 (30 Stat. 846, 890), as follows:

"The establishment of a civil pension roll, or an honorable service roll, or the exemption of any of the officers, clerks, and persons, in the public service from the existing laws respecting employment in such service is hereby prohibited."

With this distinct legislative prohibition in mind, care should be taken not to extend the Army retirement acts so as, in effect, to create not only a "civil pension roll," but a limited and special one.

The case of paymasters' clerks (27 Op. 493), which is relied on by Mr. Kent, is distinguishable. That opinion went upon the assumption that a paymaster's clerk has a status in the Army in all essential respects similar to the status of a paymaster's clerk in the Navy, and as the latter officer had been considered by the courts and by the Navy Department to be an officer of the Navy and subject to the rules and regulations of the Navy, it was assumed that the same conditions prevailed as to the analogous office of paymasters' clerks in the Army. Whether that assumption was correct or not is immaterial, in view of the recent action of Congress in specifically authorizing the retirement of such clerks. But it will be noticed that such authorization was upon the express condition that "Army paymasters' clerks shall be subject to the rules and articles of war." (36 Stat. 1044.) In any event, the opinion referred to can not be extended to cover the case of the expert accountant in the Inspector General's Department, who, for the reasons already given, is not an officer "of the Army" or subject to the rules and articles of war, and is not so considered by the War Department.

254 *Issuance of Commission in Name of Deceased Officer.*

My opinion, therefore, is that Mr. Kent is not entitled to retirement under the circumstances stated in your communication, and under the statutes of the United States relating to the subject, and I have the honor to advise you accordingly.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

The SECRETARY OF WAR.

---

ISSUANCE OF COMMISSION IN NAME OF DECEASED ARMY OFFICER.

A commission as major of Cavalry can not be lawfully issued in the name of an officer of the Army whose death occurred after he was nominated to that grade by the President but prior to the time the nomination was confirmed by the Senate.

It is essential to the creation of such office that there should be an appointment by the President, in addition to a nomination to, and consent by, the Senate.

DEPARTMENT OF JUSTICE,  
*September 22, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th ultimo, requesting an opinion as to whether or not a commission as major of Cavalry can be lawfully issued in the name of John T. Haines, late captain, United States Army, under the following circumstances:

"Capt. Haines became entitled to promotion to the grade of major of Cavalry by reason of seniority from March 3, 1911, as a result of a provision in the Army appropriation act approved that date; he passed the prescribed examination for promotion April 6, 1911, was nominated to the Senate by the President on May 4, 1911, for the promotion, and the nomination was confirmed by the Senate May 15, 1911. But, in the meantime, prior to his confirmation, his death occurred on May 11, 1911.

"The return of his command for the month of April, 1911, shows that Capt. Haines was commanding a squadron of his regiment, the appropriate command of a major, at the time the return was rendered."

That an appointment by the President, in addition to a nomination to, and consent by, the Senate, is essential, as

an ordinary thing, to the creation of a constitutional office is settled (*Marbury v. Madison*, 1 Cranch, 137; 4 Op. 219; 9 Op. 297; 13 Op. 44) and that the appointment must be evidenced either by a formal commission or by some unequivocal act is clear. (*Bennett's case*, 19 Ct. Cls. 379.) Though an acceptance of the appointment by the appointee may not be necessary (*Marbury v. Madison*, supra), in analogy to the law in some jurisdictions that a deed is valid after delivery without acceptance by the grantee (*Mitchell v. Ryan*, 3 O. St. 377; *United States v. Schurz*, 102 U. S. 378; 12 Op. 229), yet it is clearly necessary everywhere that there should be a grantee *in esse*, capable of assent, at the time of the delivery of the deed, or making of the appointment. Therefore it must be admitted that if this were a case of an ordinary appointment, where the selection of the person to be appointed had been left by law to the discretion of the President, no valid commission could, in the nature of things, be issued, since Capt. Haines died before any appointment by the President had, in fact, been made.

A promotion in the Army differs from an original appointment therein, in that the discretion of the President is, by regulations and statute, confined in cases of promotion to certain specific persons, and appointment follows as a rule on vacancy, seniority, and a favorable examination. (Act Oct. 1, 1890, c. 1241, secs. 1 and 3, 26 Stat. 562; 17 Op. 196; *Howell's case*, 25 Ct. Cls. 288; 10 Op. 144; 12 Op. 229; dictum Solicitor General Phillips, 16 Op. 615; and see the résumé of the regulations and legislation in Attorney General Williams's Opinion, 14 Op. 164.) It is spoken of as a "right" in section 3 of the act of October 1, 1890.

Congress has undoubtedly confined the President's discretion in the matter of promotions, to the extent, at least, of designating the class from which the appointment for promotion must be made. It has even been argued that the power both of appointment and promotion in the Army is solely in Congress, under its power "to declare war," "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces" (Const. U. S. Art. I, sec. 8), being withdrawn from the

President's jurisdiction by the words "whose appointments are not herein otherwise provided for" in Article II, section 2. (Fry's Military Miscellanies, Appendix A; report of Senate committee Apr. 12, 1822, Am. St. Pap. Military Affairs, vol. 2, p. 406; report of Senate committee, 58th Cong., Cong. Doc. ser. 4576.) If this view be correct, it might be claimed with some force that the effect of the Army regulations and acts of Congress on the subject of promotion is to give the senior officer a vested right to promotion at the moment a vacancy occurs and to make confirmation by the Senate and appointment by the President unnecessary, or at most merely formal and evidential acts. (Opinion of Attorney General Bates, 10 Op. 144; *Gen. Ainsworth's case*, 22 Op. 480.) I can not, however, admit the correctness of the above view. Promotion in the Army is, in the last analysis, merely an *appointment* to a higher office therein; and this fact is illustrated and confirmed by the long established practice of submitting nominations for promotion in the Army to the Senate for confirmation and of thereafter issuing a commission for the higher office. Promotion, therefore, having regard to its real nature, is as much or as little within the President's constitutional power of appointment as an original appointment, and is subject, in so far as that matter is concerned, to the same considerations. Now appointment in the Army as in any other department of the Government is an executive, not legislative, act (Story on Const. Vol. II, sec. 1526; Federalist No. 76; Wyman on Administrative Law, sec. 48), and the provisions of the Constitution are satisfied by giving Congress the power to make the general rules prescribing the organization and government of the Army, leaving to the President, with the advice and consent of the Senate, the designation of the particular individuals who are to fill the office created by Congress therein.

Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it can not control the President's discretion to the extent of compelling him to commission a designated individual. (President Harrison's veto, Feb. 26, 1891, Messages of Presidents, vol. 9, p. 138; Attorney General

Brewster's opinion in *Fitz John Porter's case*, 18 Op. 18.) Mandamus would not lie against the President in such a case. The matter is really concluded, in so far as this department is concerned, by Attorney General Moody's opinion in *Col. Chamberlin's case* (25 Op. 591, relying on 13 Op. 13). It follows, therefore, that, while promotion is a "right" inhering in the officer next in the line of promotion and practically almost certain to vest in him, it is yet inchoate in its nature and its legal vesting is subject to the fundamental condition of an appointment by the President, a condition now impossible of fulfillment in Capt. Haines's case.

That an appointment to an office in the Army when validly made may, in so far as concerns rank and pay, relate back, either by force of a particular statute or regulation (R. S. 1562; *Howell's case*, 25 Ct. Cls. 288; 7 Compt. Dec. 506; 15 Ibid. 157), or, perhaps, by executive act (*United States v. Vinton*, 2 Sumner, 299; 3 Op. 124; but compare 4 Op. 608), does not prove that the office itself vests at an earlier time than the date of the commission. Rank, it is said, is different from office (*Gen. Wood's case*, 15 Ct. Cls. 151; 107 U. S. 414; Pub. Doc. 58th Cong. vol. 7; 22 Op. 480; 25 Op. 591), and Congress has authority to regulate rank. (Same authorities.) While the distinction between rank and office may seem difficult to grasp in some cases, in the present case the office and rank are the same, since the designation "major" comprehends both, and Capt. Haines was not entitled to the "rank" unless he was entitled to the "office" of major.

The circumstances of this case can not but excite sympathy for the family of the deceased officer, but the fixed principles of law do not appear to permit of any other conclusion than that no valid commission as major can now be issued in his name, and I therefore have the honor to advise you accordingly.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE SECRETARY OF WAR.

APPORTIONMENT OF POSTAL SAVINGS DEPOSITS AMONG  
QUALIFIED BANKS.

When there is no bank available to receive the funds in the particular place in which a postal savings depository is located, as provided for under section 9 of the act of June 25, 1910 (36 Stat. 816), creating the Postal Savings System, the deposits should be apportioned among the qualified banks equally convenient to such locality.

DEPARTMENT OF JUSTICE,  
*September 22, 1911.*

SIR: I have your communication, dated September 7, 1911, wherein you present a question for my consideration as follows:

"Section nine of the act of June 25, 1910 (36 Stat. 816), creating the Postal Savings System, provides in part as follows:

'The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this Act and the regulations made by authority thereof \* \* \*. If no such bank exist in any city, town, village, or locality, or if none where such deposits are made will receive such deposits on the terms prescribed, then such funds shall be deposited under the terms of this Act in the bank most convenient to such locality.'

"In establishing postal savings depository offices throughout the country numerous instances have arisen where there is no local bank or none that is willing to receive postal savings funds. When there are two or more banks in a near-by city desirous of receiving these funds, all of which appear to be equally convenient since deposits are remitted by mail, doubt is entertained as to whether the total amount to be deposited should be apportioned among the several banks or assigned to one of them. For example: The post office at Red Bank, N. J., has been designated a postal savings depository. There are two national banks at that place, but neither has qualified to receive deposits of postal savings funds. At Long Branch, only a few miles distant, two banks have qualified to receive the

deposits of their own post office. It is necessary that the receipts of the Red Bank office be deposited in the near future in order that they may commence to draw interest.

"I therefore have the honor to request your opinion as to whether the provision of the postal savings act above quoted contemplates that in cases such as the one presented postal savings deposits should be apportioned among the several banks willing to receive them in the city most convenient as to locality, or whether a single bank should be selected. If you take the latter view, your opinion is further requested as to what procedure should be observed under the law in making such selection."

Section 8 of the bill entitled "A bill to establish postal savings depositories for depositing savings at interest with the security of the Government for repayment thereof, and for other purposes" (S. 5876, 61st Cong., 2d sess.), as it was originally passed by the Senate, provided in part as follows:

"That postal savings funds received under the provisions of this act shall be deposited in any solvent bank or banks subject to public supervision and examination in the State or Territory and as nearly as practicable in the immediate neighborhood in which the funds are received at a rate of interest not less than two and one-fourth per centum per annum. Where more than one such bank is available the deposits shall be distributed ratably among the banks as far as practicable on the basis of their capital and surplus."

The Report of the Committee on Post Offices and Post Roads of the House of Representatives (H. Rept. 1445, 61st Cong., 2d sess., p. 3, et seq.) contains an explanation of several of the provisions of section 9 of the bill as it was finally enacted into law, which section was substituted for section 8 of Senate bill No. 5876, but no reference is made to the change in the language of the provision last above quoted. In presenting the amended bill to the House, Representative Gardner, speaking in behalf of the committee having charge of the bill, carefully discussed, in detail, the purpose of the amendments contained in section 9, but did not touch upon the change in the language in the specific provision which you submit for interpretation.



I think that it is quite plain that the bill, as it was originally passed by the Senate, contemplated an apportionment of postal savings deposits among the banks available to receive them under the provisions of the bill, irrespective of whether or not such banks might be located in the same city, town, or village as the postal savings depository. The language relating to the redeposit of postal savings funds was radically changed in the amended bill in order to make the disposition of such funds more restricted and certain, but no express provision was made to meet the situation presented in your letter. However, the context of the statute does not indicate that there was any intention to limit or qualify the fundamental scheme of apportionment of such funds among the several banks located in the immediate neighborhood, or at the place most convenient to the postal savings depository, which might be available to receive the same under the terms of the act.

It was the avowed purpose of this legislation to keep the bulk of the funds received by postal savings depositories in local banking institutions, in so far as it might be practicable so to do, so that the same might become readily available to supply the legitimate demands of the local business communities. This object can be better attained by the apportionment of these deposits among a number of available banks rather than the centralization of such deposits in any one bank. The reason for this distributive policy applies with equal force when there is no bank available to receive such funds in the particular town or village in which the postal savings depository is located, and the redeposit must, therefore, be made in a qualified bank, or banks, located at the place most convenient thereto.

In the case which you submit there is no one bank most convenient to the locality in which the postal savings deposits are received, but, on the contrary, there are several banks equally convenient to such locality, and inasmuch as the act makes no provision for a selection under these circumstances, the designation of any one of the available banks must needs be purely arbitrary. Such a procedure would not be in harmony with the spirit and

purpose of the statute, and I am therefore of the opinion that postal savings deposits received at Red Bank, N. J., should be properly apportioned between the two banks at Long Branch, N. J., which have satisfied the requirements of the act.

Respectfully,

J. A. FOWLER,  
*Acting Attorney General.*

THE POSTMASTER GENERAL.

---

AUTHORITY OF SECRETARY OF THE TREASURY TO REMIT  
OR MITIGATE A SEIZURE.

The Secretary of the Treasury is without authority to remit or mitigate a seizure made pursuant to the provisions of subsection 7 of section 28 of the act of August 5, 1909 (36 Stat., 95), on shipments of imported frozen eggs, where the appraised value of the eggs exceeded their entered value more than 75 per cent.

DEPARTMENT OF JUSTICE,

*October 23, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of October 5, with accompanying papers, requesting my opinion as to your authority to remit or mitigate a seizure made pursuant to the provisions of subsection 7 of section 28 of the act of August 5, 1909 (36 Stat. 95), on three shipments of frozen eggs imported at the port of New York in January, 1910.

It appears that the appraised value of the eggs exceeded their entered value more than 75 per cent, and they were seized pursuant to the requirements of said subsection 7, but that forfeiture proceedings have not yet been instituted. The importers have preferred their petition to the judge of the district court at New York for a summary investigation and the remission of the penalties pursuant to section 5292 Revised Statutes, United States, and the findings of fact and testimony are now before you for consideration.

Said section 5292, Revised Statutes, provides that whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any ves-

sel or merchandise which has become subject to any seizure, forfeiture or disability, by authority of any law for imposing or collecting any duties or taxes, shall prefer his petition to the judge of the district court in which such fines, penalties, forfeitures, or disability were incurred, setting forth the circumstances and praying that the same may be mitigated or remitted; the judge shall proceed in a summary manner to inquire into the circumstances of the case, and shall cause the facts bearing on such inquiry to be annexed to the petition and transmitted to the Secretary of the Treasury, who shall thereupon have power to mitigate or remit the fine, if, in his opinion, it was incurred without willful negligence or any intention of fraud.

Section 28 of the act of August 5, 1909 (36 Stat. 95), amending the customs administrative act of 1890, provides in subsection 7 that the importer of merchandise at the time of making his written entry thereof may add to or deduct from the cost or value stated in the invoice produced with his entry, such amount as, in his opinion, will make the entry state the actual market value of the merchandise in the markets of the country from which it was imported at the time of the exportation to the United States; that the collector shall cause the actual market value of such merchandise to be appraised, and that if such appraised value shall exceed the value declared in the entry there shall be levied an additional duty of 1 per cent of the total appraised value for each 1 per cent that such appraised value exceeds the declared value, which additional duty, however, is limited to 75 per cent of the appraised value. After providing that such additional duties shall not be construed to be penal, and shall not be remitted except in cases of manifest clerical error, the section continues:

*“Provided, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than seventy-five per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding other than a criminal prosecution that may result from*

such seizure, the undervaluation as shown by the appraisal shall be *presumptive evidence of fraud*, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of *fraudulent intent* by sufficient evidence. \* \* \* *Provided further, That \* \* \* no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury.*"

You state that the importers contend that, inasmuch as said section 5292 gives the Secretary authority to remit in cases where merchandise has become subject to seizure, and the act of 1909 does not mention seizure, the prohibition in section 5292 applies only after the forfeiture has been adjudged, pending which the Secretary has authority to remit a seizure.

I agree with the Solicitor of the Treasury, whose opinion you transmit to me, that there is no merit in this contention. The importers are clearly in error in stating that the act of 1909 does not mention seizure; by that act the collector is expressly directed to seize the offending merchandise.

Section 5292 of the Revised Statutes is taken from section 1 of the act of March 3, 1797. The Supreme Court early held that the authority of remission given by this statute existed from the doing of the act resulting in the liability until the fine or forfeiture was reduced to actual possession by the Government, and could be exercised both after as well as before the actual adjudication. (*United States v. Morris*, 10 Wheat. 246.)

Upon careful examination of the act of 1909, I am clearly of the opinion that it was the intention of Congress that the authority of remission given in section 5292 should not apply in any way to the additional duties, forfeitures, and penalties therein imposed, but that when the statute emphatically prohibited the remission of any forfeiture or disability *incurred* thereunder it was understood that such liability was legally incurred from the moment of the doing of the fraudulent act.

A brief consideration of the history of this act but strengthens my opinion.

Section 7 of the customs administrative act of 1890 provided for an additional duty for undervaluation and for the forfeiture of the importation if the undervaluation exceeded 40 per cent. It was held by Attorney General Olney in 1893 (20 Op. 660) that this additional duty, as well as the forfeiture, was penal, and might, therefore, be remitted under section 5292 of the Revised Statutes.

The act of July 24, 1897 (30 Stat. 211), amending this section in other particulars, contained the provisos, appearing in the present legislation, prohibiting the remission by the Secretary of the Treasury of the additional duty, and of any forfeiture or disability incurred thereunder. Attorney General Griggs, construing this act (22 Op. 491), held that such forfeiture could not be remitted either before or after the adjudication.

I therefore advise you that you are without authority to remit or mitigate the seizure in question.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

---

#### OFFICERS OF THE MARINE CORPS AND OF THE NAVY— RELATIVE RANK.

The Secretary of the Navy is without authority to make such a change in article 23 of the Navy Regulations, 1909, as to fix the relative rank of officers of the Marine Corps with officers of the Navy according to the length of service rather than by the date of commission.

Paragraph 3 of article 25 of the Navy Regulations, 1909, may be amended in form so as to read: "When officers of the Army are associated jointly with officers of the Navy or Marine Corps their corresponding rank shall be determined according to the dates of their respective commissions, when of the same or of corresponding grades; and when of different rank, as set forth in the first paragraph of this article."

DEPARTMENT OF JUSTICE,

*October 31, 1911.*

SIR: I have the honor to reply to your letter of August 19, 1911, requesting my opinion on two questions.

The first question is whether you may lawfully make such a change in article 23 of the Navy Regulations, 1909, as to fix the relative rank of officers of the Marine Corps with

officers of the Navy according to the length of service rather than the date of commission, as it is now is.

In so far as the question concerns the relative rank of officers of the Marine Corps with officers of the *staff* of the Navy, it seems to have been answered in the negative by the opinion of Mr. Acting Attorney General Hoyt, dated July 20, 1906 (26 Op. 16).

In so far as the question concerns the relative rank of officers of the Marine Corps with officers of the *line* of the Navy, it seems also to have been answered in the negative by the prior opinion of Mr. Attorney General Moody, dated October 7, 1905 (25 Op. 517).

In view of the provisions of Revised Statutes, section 1603, by which the officers of the Marine Corps are placed "in relation to rank, on the same footing as officers of similar grades in the Army" (i. e., precedence by date of commission rather than by service), I see no escape from the conclusion stated in these two opinions.

Probably only legislation can solve the various dilemmas which arise in cases of the association together of naval officers of the staff, naval officers of the line, and officers of the Marine Corps.

The second question is whether paragraph 3 of article 25 of the Navy Regulations, 1909, which now reads as follows:

"Officers in the same grade in the Army, Navy, and Marine Corps have relative rank and precedence among themselves according to the dates, respectively, of their commissions, the senior in commission ranking the junior." may be amended in form so as to read:

"When officers of the Army are associated jointly with officers of the Navy or Marine Corps, their corresponding rank shall be determined according to the dates of their respective commissions, when of the same or of corresponding grades; and when of different rank as set forth in the first paragraph of this article."

There appears to be no legal objection to this change.

The papers submitted are returned herewith.

Very respectfully,

WINFRED T. DENISON,  
*Acting Attorney General.*

THE SECRETARY OF THE NAVY.

POSTAL SAVINGS DEPOSITORIES—OWNERSHIP OF  
SECURITIES.

It is not essential, under the postal savings depositories act of June 25, 1910 (36 Stat. 814), that the securities taken by the board of trustees for the payment of postal savings funds shall be the property of the bank. Where securities belonging to the directors or stockholders of a bank are pledged at their request with the board of trustees in behalf of the bank in consideration of the deposits of postal savings funds with the bank, the requirements of the act are satisfied.

It would seem advisable that every deposit of securities with the board of trustees should be made by the bank itself, always assuming that it is accompanied by assurance from the owners admitting their consent to the pledge for the consideration running from the Government to themselves, namely, the deposit to be made by the Government at their request in the bank in which they are interested.

DEPARTMENT OF JUSTICE,

*November 3, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of October 4, 1911, requesting my opinion as to a question of the proper construction of section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 814, 816), and as to the power of the board of trustees thereunder. The pertinent portion of this section is as follows:

“That postal savings funds received under the provisions of this Act shall be deposited in solvent banks, whether organized under National or State laws, being subject to National or State supervision and examination. \* \* \* The board of trustees shall take from such banks such security in public bonds or other securities, supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand.” \* \* \*

From your letter it appears that under the laws of Michigan and Wisconsin, State banks, and under the laws of Massachusetts, trust companies, eligible, if solvent, to receive deposits of postal funds under the act of June 25, 1910, are prohibited from pledging their assets as collateral security for deposits, and are therefore unable to transfer to the board of trustees, under section 9 aforesaid, “public

bonds or other securities" *of their own*. It appears, however, that they propose to have such public bonds or securities, being the property of their directors or stockholders, deposited by such directors or stockholders as individuals with the Treasurer of the United States as security for the deposit of postal savings funds with such banks, it being understood that the banking departments of these States have no objection to such a procedure.

Your question is, specifically, whether the board of trustees is justified, under the act of June 25, 1910, in approving such a method of securing postal savings deposits.

The first question involved is whether it is essential under the act that the securities taken by the board of trustees shall be the property of the bank itself.

I am of opinion that it is not essential.

The statute does not in its terms make any such requirement specifically; nor does it by any implication from its purpose, which is merely to secure the safety of the deposit, as is expressly stated:

\* \* \* "The board of trustees shall take from such banks *such security* in public bonds or other securities, supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to *insure the safety and prompt payment* of such deposits on demand."  
\* \* \*

If, then, a valid, effective title as pledgee is acquired by the board of trustees—in other words, if there is *security*—the statute in this respect is satisfied.

The question whether such a title as pledgee would pass to the board in the cases in question depends substantially upon the same considerations which arise in the ordinary cases under the act. The only new element is the fact that the security is furnished, not by the indebted bank, but in its behalf by certain of its directors and stockholders. The legal consideration essential to the validity of the pledge exists quite as clearly as in the ordinary case under the act. It grows from the interest which these individual directors and stockholders of a bank have in its prosperity. (*Lawrence v. McCalmont*, 2 How. 426; *Zabriskie v. Cleveland*,



etc., R. R. Co., 23 How. 381, 399; *Harrison v. Union Pacific Ry. Co.* 13 Fed. 522.)

Also as to any effect of possible equities, the situation would be the same as in the ordinary case. The securities coming to the board are negotiable instruments (*Murray v. Lardner*, 2 Wall. 110; *Goodwin v. Roberts*, L. R. 10 Ex. Cases 337), and the board as pledgee for value would not be affected by any prior equities of which it has no notice any more than if it were an out-and-out purchaser. (*Oates v. National Bank*, 100 U. S. 239; *American File Co. v. Garrett*, 110 U. S. 288, 294.)

If, then, the securities in question are pledged in consideration of the deposit of the funds with the bank at the request of the owners, I am of opinion that the requirements of the act would be satisfied.

The second question involved is one of detail. The proposal as stated is that the deposit of the securities is to be made by the individual directors or stockholders who own them. In view of sections 6, 7, 14, 16, 17, and 20 of the regulations of the board, and of the phrase used by the statute:

“The board of trustees shall take from *such banks* such security,”

it would seem advisable that every deposit should be made by the bank itself, always assuming that it is accompanied by assurance from the owners admitting their consent to the pledge for the consideration running from the Government to themselves, namely, the deposit to be made by the Government at their request in the bank in which they are interested.

With this qualification, I am of opinion that the board of trustees would be justified in approving the method proposed.

Very respectfully,

WINFRED T. DENISON,

*Acting Attorney General.*

THE POSTMASTER GENERAL.

SOVEREIGNTY OVER THE COLON WHARF OF THE PANAMA  
RAILROAD CO.

A vessel loading at the Colon Wharf of the Panama Railroad Co. and subsequently entering a port of the United States should be regarded as coming from a "foreign port or place" within the meaning of section 36 of the tariff act of August 5, 1909 (36 Stat. 111), and the Republic of Panama, for the purposes under consideration, should be treated as sovereign over such wharf.

DEPARTMENT OF JUSTICE,

*November 4, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 10th ultimo, requesting an opinion "as to whether the United States or the Republic of Panama is sovereign over the Colon Wharf of the Panama Railroad Co." This question, as your letter shows, arises from the claim made that vessels loading at this wharf and subsequently entering a port of the United States are not from a "foreign port or place" within the meaning of section 36 of the tariff act of August 5, 1909 (36 Stat. 111), although the said wharf is within the boundaries of the city of Colon, Republic of Panama.

In the correspondence accompanying your letter it is argued that the United States, being the owner of all the capital stock of the Panama Railroad Co., and having succeeded to all the reversionary rights of the Republic of Panama, is, for that reason, in reality the owner of the property of the railroad company, including this wharf, and that the effect of such ownership is, in the nature of things, to make the United States sovereign over the said property, and hence to withdraw this wharf from the jurisdiction of the Republic of Panama.

The consideration of this proposition does not seem to require any expression of opinion as to the relationship of the United States toward the property of the Panama Railroad Co.; for, assuming that the United States is the absolute owner of such property, as contended, it does not follow that it is *sovereign* over it in such a sense as to make the wharf any the less in a "foreign port or place" within the meaning of the act of August 5, 1909.

It is clear that it was the intention of the parties to the treaty of February 26, 1904, between the Republic of Panama and the United States (33 Stat. 2234) to leave Colon subject to the sovereignty of the Republic of Panama. Article II of the treaty, after granting to the United States the Canal Zone, provides "that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant." Article III of the treaty deals specifically with the matter of sovereignty, but the grant thereof to the United States is expressly limited to the territory described in Article II. By Article VII a right of purchase and of eminent domain within the cities of Panama and Colon is granted to the United States for *limited purposes*; and the Republic grants the United States the right to enforce in Colon ordinances relating to sanitation, water supply, and public order, *provided the Republic fails or is unable to enforce them itself*. By Article IX Panama and Colon are made free ports for certain purposes, but for all other purposes customs duties may be levied there by the Republic of Panama.

These various provisions of the treaty are inconsistent with a grant to the United States of sovereignty over Colon or wharves located there except for specific limited purposes, and clearly disclose the intention to preserve Colon as a port of the Republic of Panama. (See 29 Op. 194.) Unless, therefore, the mere ownership of property by one sovereign in the territory of another carries sovereignty with it, *ex necessitate*, so as to override the plain stipulations of the treaty under which the property was acquired, the town of Colon and the wharves of the Panama Railroad Co. therein are part of the Republic of Panama and subject to its sovereignty. It may be assumed that a sovereign state can not acquire property anywhere without impressing it to some degree with its own attributes of sovereignty, from which a state can not wholly divorce itself. But when property is acquired by one state in another state by virtue of a treaty, any sov-

ereignty which may attach to the property so acquired is limited by the terms on which, and the purposes for which, the property was acquired, and only displaces the plenary sovereignty of the dominant state to that limited extent. There seems to be nothing in reason or in law which prohibits such a situation. It occurs in, and is illustrated by, the cases in which the United States owns land in one of the States of the Union without cession by and consent of the State. (*Commonwealth v. Young*, Brightly's Rep. 302; *People v. Godfrey*, 17 John. (N. Y.) Rep. 225; *Fort Leavenworth Railroad Company v. Lowe*, 114 U. S. 525, 531, 539; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158, 169; *Camfield v. United States*, 167 U. S. 518, 525; *Kansas v. Colorado*, 206 U. S. 46, 89.) The State still remains sovereign to all practical intents and purposes over the land so acquired, though such sovereignty can not be exercised so as to embarrass the United States in the use of the property for the purposes for which it was obtained. So in Panama the United States may have some rights of sovereignty over the property of the Panama Railroad Co. in Colon and over property acquired by purchase or condemnation under Article VII of the treaty, and yet such property, for general purposes, is to be regarded as within the limits and jurisdiction of the Republic of Panama. This, in my opinion, is the proper view to take of the situation with respect to the Colon Wharf of the Panama Railroad Co.

I have the honor to advise you, therefore, that, for the purposes of the question before your department, the Republic of Panama is to be treated as sovereign over such wharf, and a vessel loading there and subsequently entering a port of the United States as coming from a "foreign port or place" within the meaning of the statute imposing tonnage duties.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.

TRANSFER OF TITLE TO SCHOOL BUILDING FROM GOVERNMENT TO THE TOWN OF PETERSBURG, ALASKA.

The title to a school building in the town of Petersburg, Alaska, which was constructed out of the "Alaska fund" under section 5 of the act of January 27, 1905 (33 Stat. 617), can not be transferred from the Government to the town of Petersburg except by an act of Congress.

DEPARTMENT OF JUSTICE,  
*November 7, 1911.*

SIR: I have the honor to reply to the question raised by the governor of Alaska in his letter to you dated October 2, 1911, and transmitted to me by your direction on October 19, 1911.

The question is whether the title to a school building in the town of Petersburg, Alaska, can lawfully be transferred to the town. The building was constructed out of a sum of \$1,000 provided by the governor from the "Alaska fund" (act of Jan. 27, 1905, ch. 277, sec. 5, 33 Stat. 617). After the construction the town was incorporated and the building continued to be used for school purposes by the municipal school board. The board now inquires through the governor whether the Government "is willing to give and transfer said school building to the town of Petersburg" and "upon what terms such transfer could be effected, and how soon legal title could be obtained by the town."

I am of opinion that an act of Congress would be required to make the transfer possible.

The title to the property is concededly and clearly in the Government. Neither by the act above cited providing for the Alaska fund, nor by the Civil Code of Alaska under which the incorporation of the town occurred, nor by any other law does there appear to be any provision for the automatic transfer of public property from the United States to the local authorities upon such an incorporation.

In the case of a school at Juneau a similar transfer was made by special act of Congress. (Act of Jan. 16, 1903, ch. 192, 32 Stat. 773.)

It is thoroughly settled that property of the United States can not be granted away except by act of Congress, which has absolute and exclusive power over such property. (*Irvine v. Marshall*, 20 How. 558; *Van Brocklin v. Tennessee* 117 U. S. 167; *Butte City Water Co. v. Baker*, 196 U. S. 126;

*Kansas v. Colorado*, 206 U. S. 89; *Light v. United States*, 220 U. S. 536; 20 Op. 284, 420.)

I am, therefore, of opinion, as above stated, that the transfer requested can not now be made.

I return the letter of Governor Clark, dated October 2, 1911, with the inclosure.

Very respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

---

DESIGNATION OF SPECIAL DISBURSING AGENT BY CHIEF  
CLERK OF THE DEPARTMENT OF THE INTERIOR.

Where, during the temporary absence of the Secretary and the Assistant Secretaries, the chief clerk of the Department of the Interior, by authority of the Secretary, signed a communication as "chief clerk and chief executive officer," designating a special disbursing agent, the designation thus made is valid by virtue of authority granted by the act of March 4, 1911 (36 Stat. 1213).

The bond required in this case should show on its face that the designation was made under the act of March 4, 1911, by the chief clerk and executive officer by authority of the Secretary of the Interior in the temporary absence of the Secretary and his assistants.

DEPARTMENT OF JUSTICE,

*November 15, 1911.*

SIR: I have the honor to respond to your request of October 4, 1911, for my opinion on the following case:

On August 28, 1911, during the temporary absence of yourself and the Assistant Secretaries of your department, the chief clerk signed a communication designating Mr. Daniel B. Miller, a United States surveyor of the General Land Office, as a special disbursing agent, and requiring him to file an official bond. This communication was signed by the chief clerk as "Chief Clerk and Chief Executive Officer."

The question is whether the designation so made is valid.

I am of opinion that it is.

Ordinarily such appointments must be made by the head of the department, and so it is directed by section 3614 of the Revised Statutes, which reads as follows:

"Whenever it becomes necessary for *the head of any department* or office to employ special agents, other than

officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as *the head of the Department* or office employing them may approve."

In this case the communication making the appointment was not signed by the head of the department, but by the chief clerk, at a time when you and your Assistant Secretaries were temporarily absent, the chief clerk acting pursuant to authority delegated to him by an order of the Acting Secretary. There is no question that this authority was covered, and intended to be covered, by the Acting Secretary's order, but the question is whether it could legally be given.

It appears to be clear that the power of appointment, especially where fixed by statute in the head of the department, can not be delegated to subordinates without authority of Congress (21 Op. 355), but in this case I think the authority was granted by the appropriation act of March 4, 1911, c. 237 (36 Stat. 1213), in the clause which reads as follows:

"\* \* \* Chief clerk, including five hundred dollars as superintendent of buildings, who shall be chief executive officer of the department and *who may be designated by the Secretary of the Interior to sign official papers and documents during the temporary absence of the Secretary and the Assistant Secretaries of the department*, four thousand dollars \* \* \*."

This language is general, and it does not in terms expressly exclude from its operation *any* official paper or document. So far as its direct terms go, it might be construed to authorize the delegation of every function of the Secretary of the Interior which would be exemplified by an "official paper" or "document."

Under a somewhat similar statute Comptroller Tracewell indicated (9 Comp. Dec. 446) a possible distinction between "major duties" of the head of a department, being those duties which ordinarily receive and require his own personal discretion, and his minor duties, which ordinarily do not require such discretion. In the case before him certain

vouchers had been approved by the chief clerk of the War Department, claiming authority under an act which provided that the Secretary of War, when temporarily absent from the War Department, "may authorize the chief clerk of the department to sign requisitions upon the Treasury Department and other papers requiring the signature of said Secretary." The comptroller held that even if delegation of the so-called major duties was not authorized by this act, the duty of approving the vouchers did not fall within that class of duties and could be delegated to the chief clerk, notwithstanding other acts of Congress which required the approval to be by the Secretary of War.

Passing the question whether so-called "major duties" could be delegated by the Secretary to the chief clerk under the statute before us, I am of opinion that this appointment is not one of that class of acts. A "disbursing agent" is, as his name implies, a mere "agent" of the department, of a subordinate, minor character. In general practice, as I am informed, this grade of appointments are bureau matters not actually receiving the personal consideration of the head of the department. They are in actual fact, and in the customary administration of the departments, a mere part of the daily routine going through to signature under the initials of the bureau heads. I understand that there are on an average 40 such appointments in each day's mail of your department, and that they are not considered in the departments to be of any greater sanctity than the bulk of the day's mail.

If even these minor routine actions are to be excepted from the general authorization of the statute, that authorization will practically be limited to papers and documents concerning mere matters of information, answers to queries, and those other types of correspondence which involve no real action whatever. I do not think such a limitation of the language would be consistent with the plain spirit and purpose of the act, which is to keep the wheels of the department actually moving all the time, even during the absence of yourself and the Assistant Secretaries when such absences happen to coincide. To limit the application of the act to what may be called the inoperative mail, and to



exclude from it the operative mail, would necessarily defeat that very object and make the act substantially valueless for the obvious purpose for which it was enacted.

Other opinions tending to confirm this view are the opinion of Mr. Attorney General Harmon (21 Op. 355) and that of Mr. Attorney General Cushing (7 Op. 594), both of them holding that a general power of delegation granted by Congress to an officer carried with it authority to delegate even certain functions which other acts of Congress required to be exercised by the officer himself.

I am of opinion, therefore, as above stated, that the designation of the disbursing agent in question is lawful.

I have conferred with the Solicitor of the Treasury, and he authorizes me to say that the views which he expressed in his opinions transmitted with your question were founded upon the informality on the face of the bond submitted to him for approval. I think his objection in that respect is well founded and that the form of the bond should be revised, so as to show on its face that the designation was made under the act of March 4, 1911, by the chief clerk and executive officer by authority of the Secretary of the Interior in the temporary absence of the Secretary and his assistants.

Herewith I return the inclosures which accompanied your letter.

Very respectfully,

WINFRED T. DENISON,  
*Acting Attorney General.*

The SECRETARY OF THE INTERIOR.

---

REMOVAL OF STEAMER "JOHN B. KETCHAM NO. 2" FROM  
WEST NEEBISH CHANNEL.

The claim of the Reid Wrecking Co. against the Government for services in removing the steamer *John B. Ketcham No. 2* from the West Neebish Channel should be paid and that company should not be required, as a condition precedent to the payment of its claim, to bring the vessel within the jurisdiction of the United States since said vessel has been sold under appropriate judicial proceedings.

The statute under which this claim arises makes no provision for the payment of interest, therefore none can be paid.

DEPARTMENT OF JUSTICE,  
*November 22, 1911.*

SIR: I have the honor to acknowledge receipt of your letter of the 11th instant, resubmitting the correspondence in the claim of the Reid Wrecking Co. (Ltd.), for services in removing the steamer *John B. Ketcham No. 2* from the West Neebish Channel, concerning which an opinion was rendered at your request on February 28, 1911 (28 Op. 626).

You now call attention to the further statement of the claim of said company embodied in the brief of their attorneys, and to the report of the Judge Advocate General thereon, copies of which accompany your letter, and request my opinion "as to whether upon the facts, as they now appear, the payment of this claim is warranted."

The brief of the company's attorney, and the report of the Judge Advocate General, show that the company, after removing the *Ketcham* to its dock in Canada, filed a libel in admiralty against the vessel in the Canadian courts to enforce the liens held by it against the vessel; that notice of the sale of the vessel was mailed to and received by your engineer officer at Detroit, Mich.; that the vessel was bid in, not by the Reid Wrecking Co., but by a company controlled by the stockholders of the Reid Wrecking Co.; that the amount realized from the sale was insufficient to cover the claims of that company for completing the raising of the vessel and the expenses of the sale, etc., so that nothing remained to satisfy any other claims against the vessel.

Since the receipt of your letter counsel for the Reid Wrecking Co. has submitted copies of additional papers showing that the vessel was actually sold for \$12,650, and that out of this sum the company was allowed \$10,158, together with its costs. The amount remaining and its disposition, however, is not shown.

It is proper to state at this point that these facts were not before me when I rendered my opinion of February 28, 1911, above referred to. That opinion, of course, proceeded upon the hypothesis that the company was holding the ves-

sel, not because it had acquired title to it through appropriate judicial proceedings, but merely as security for its various claims. Under the circumstances it was believed that it was contrary to good conscience for it to continue to do this and at the same time demand payment of the amount due it by the Government, which amount was specifically made a charge upon the vessel by section 20 of the act of March 3, 1899 (30 Stat. 1154).

The new facts submitted, however, present a different situation, and assuming that the admiralty proceedings were had with the result stated, as set forth in the papers submitted, I have the honor to advise you that the claim of the Reid Wrecking Co. against the Government for services in removing the steamer *John B. Ketcham No. 2* from the West Neebish Channel should now be paid, it being no longer proper, under existing facts, to require the company, as a condition precedent to the payment of its claim, to bring the vessel within the jurisdiction of the United States so that it might be here sold for the benefit of all lienholders.

It seems to be the well-settled rule of admiralty that a decree of any of its courts binds all the world and that "whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal." (See Benedict on Admiralty (1894), pp. 208, 209; *Penhallow v. Doane*, 3 Dallas, 86; *The Mary*, 9 Cranch, 126, 143, 144; *The Trenton*, 4 Fed. 657; *The Garland*, 16 Fed. 283.)

While under these decisions the duty undoubtedly rested upon the Government to intervene in the admiralty proceedings mentioned for the protection of any lien which it may have had upon the vessel, the facts disclosed indicate that the sum, if any, remaining in the court after the payment of the claim of the Reid Wrecking Co. was probably so small as not to justify the expense incident to such intervention. However, I think you should ascertain the exact facts upon this point, and advise me thereof,

so that if it be deemed advisable action can be had looking to the application of the amount toward the discharge of the Government's claim.

This suggestion need not delay your directing payment of the claim of the Reid Wrecking Co., now before you.

It is noted that the company demands payment not only of the contract price, to wit, \$18,459, but also interest thereon at 6 per cent from July 7, 1910.

The statute under which this claim arises makes no provision for the payment of interest, therefore none can be paid by you. (*United States v. Bayard*, 127 U. S. 251, 260; *United States v. North Carolina*, 136 U. S. 211, 216; *Baxter v. United States*, 51 Fed. 671, 675.)

The papers transmitted with your letter are herewith returned.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

---

#### CONSTRUCTION OF NAVAL VESSELS—EIGHT-HOUR LAW.

The provisions in the naval appropriation act of March 4, 1911 (36 Stat. 1288), relating to an eight-hour workday for employees engaged in the construction of the vessels therein authorized, are not limited to the employees of contractors but apply to employees of subcontractors engaged in the actual construction of said vessels.

Under the eight-hour restrictions of said act, the person, firm, or corporation actually constructing any of the vessels therein specified must establish an eight-hour workday for all of its employees engaged in making any of the parts of the vessels and in assembling those parts upon their completion.

These eight-hour restrictions prohibit the working of employees more than eight hours a day in the construction of said vessels and their machinery, and they can not be nullified by permitting the employees by contract with their employers to work overtime for additional compensation.

DEPARTMENT OF JUSTICE,

*December 21, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant in which you request an opinion

as to the scope of certain provisions in the naval appropriation act, passed March 4, 1911 (36 Stat. 1265, 1287, 1288).

The portions of the act to which you call my attention are part of the subdivision headed "Increase of the Navy," under which heading it is provided that:

"\* \* \* the President is hereby authorized to have constructed two first-class battleships \* \* \*, to cost, *exclusive of armor and armament*, not to exceed six million dollars each.

Two fleet colliers \* \* \*, to cost not to exceed one million dollars each.

"Eight torpedo-boat destroyers \* \* \*, to cost not to exceed eight hundred and twenty-five thousand dollars each.

"Four submarine torpedo boats, in an amount not exceeding in the aggregate two million dollars, and the sum of eight hundred thousand dollars is hereby appropriated for said purpose: *Provided, That no part of this appropriation shall be expended for the construction of any boat by any person, firm or corporation which has not at the time of the commencement and construction of said vessels established an eight-hour workday for all employees, laborers and mechanics engaged, or to be engaged in the construction of the vessels named herein.*"

Further on in the act, under the same heading, is the following general provision:

"Construction and Machinery: On account of hulls and outfits of vessels and steam machinery of vessels heretofore and herein authorized, thirteen million five hundred and thirty-one thousand seven hundred and eighty-five dollars and seventy-nine cents: *Provided, That no part of this appropriation for the construction and machinery of battleships shall be expended for the construction of any battleships by any person, firm or corporation which has not at the time of the commencement and during the construction of said vessels established an eight-hour workday for all employees, laborers and mechanics engaged, or to be engaged in the construction of the vessels named herein* \* \* \*."

You say that—

“Contracts for the construction of the four submarine torpedo boats have been made with the Electric Boat Co., of Quincy, Mass., and that company, which has no shipbuilding yard at which the vessels could be constructed, has made contracts with the Fore River Shipbuilding Co., of Quincy, for building two of said vessels that are to be delivered on the Atlantic coast; with the Union Iron Works Co., of San Francisco, for building the other two of said vessels which are to be delivered on the Pacific coast; and with engine building companies for certain parts of the machinery for said vessels. Under these contracts payments on the vessels are to be made to the contractor, the Electric Boat Co., and no contractual relation will subsist between the department and any of the subcontractors. The Electric Boat Co. has informed the department that it has established an eight-hour workday for its employees, but the other companies named have not established an eight-hour workday for their employees that are to be engaged upon the construction of said submarine boats.

“Contracts for the construction of the two battleships authorized by said act have not yet been made, but proposals for building them have been advertised for, to be opened on the 4th of January next.”

The first question upon which my opinion is asked is—

“Whether the restriction in the act of March 4, 1911, as quoted above, relating to employees, laborers, and mechanics engaged in the construction of said vessels, applies to employees of the subcontractors engaged in building said submarine boats or the machinery therefor.”

Considering this question in the light of the statements made by you as to the contracts with the Electric Boat Co., of Quincy, Mass., for the construction of the four submarine torpedo boats, which company has no shipbuilding yard at which the vessels could be constructed, and has made contracts with other companies for the construction of said boats, I have no hesitation in saying that the eight-hour restrictions of the statute were intended to apply to the employees of subcontractors engaged in the actual construction of said boats. To hold that such restrictions

apply to the person having the contract, rather than the one actually constructing the vessels, would nullify it completely. It will be observed that the provisions of the act on the subject of the eight-hour workday are not limited to contractors, but apply to any person, firm, or corporation which is engaged in the construction of the vessels authorized.

The second question presented by you is—

“Whether the eight-hour day restriction in said act, as quoted above, applies to workmen employed only upon the hull and machinery of a vessel as such, a submarine boat or a battleship, or also to other workmen employed in the establishment of the contractor or a subcontractor in the production of materials for use in the construction of the vessel or machinery.”

As I interpret the eight-hour restrictions of the act, the purpose was to compel the person, firm, or corporation actually constructing any of the vessels authorized to establish an eight-hour workday for all their employees engaged or to be engaged upon such work. It is argued by counsel representing certain shipbuilding concerns that the words “construction of said vessels,” as used in the act, are to be construed as limited simply to the assembling of the several parts of the vessels at the shipyard, and not as including the making, molding, or fabrication of said parts at the plant of the person constructing the vessels. I think this is placing too narrow an interpretation upon the act. The construction of a vessel in a broad sense includes the fabrication of its parts, and I think the language of the act indicates the purpose of Congress to require the person, firm, or corporation constructing the vessel to establish an eight-hour workday at its plant for all of its employees engaged in making any part of the vessel, as well as for those engaged in assembling those parts upon their completion.

Whether the eight-hour restriction applies to the manufacture of the machinery for said vessels is a matter of considerable doubt, owing to the confusion of language in the act upon this subject. In the paragraph entitled “Construction and machinery,” Congress has treated the vessels

authorized as composed of hulls, outfits, and steam machinery, apparently making a distinction between "construction" and "machinery." The outfits and machinery of a vessel are not parts of the vessel, before installation, in the same sense as is a plate or other portion of the hull, and the language of the act undoubtedly justifies the inference that while the appropriation for the machinery of the battleship authorized was not to be expended until the person constructing the vessel had established an eight-hour workday for its employees engaged in such construction, Congress did not regard the manufacture of the machinery as a part of the construction work. This view, however, is weakened by the fact that in the succeeding paragraph relating to torpedo boats and subsurface destroyers theretofore authorized, it is provided that no part of the appropriation therein made "shall be expended for the construction of any boat by any person, firm, or corporation which has not at the time of the commencement and during the construction of said vessels established an eight-hour workday for all employees, laborers, and mechanics *engaged in doing the work for which this appropriation is made.*" The work so appropriated would, of course, include the manufacture of the machinery of the vessels authorized.

On the whole, I think that the intention of Congress, as it is to be gathered from the several provisions of the act, was that the person, firm, or corporation actually constructing the vessel should establish an eight-hour workday for all of its employees engaged upon any of the work authorized by the act, which, it is to be observed, is the complete construction of certain submarine torpedo boats and battleships, the latter exclusive of armor and armament. This view is in substantial accord with the opinion rendered by the Comptroller of the Treasury under date of August 3, 1911, in respect to the meaning of the provisions in question.

Your third question reads:

"Whether said eight-hour workday provision prevents the working of employees, laborers, and mechanics more than eight hours a day in the construction of said vessels



and their machinery under regulations governing what is generally known as 'overtime.'"

There is undoubtedly ground for the contention that the expression "eight-hour workday," as used in the act, does not necessarily prohibit contracts between an employer and his employees by which the latter may, for a consideration, work overtime. This argument receives additional force from the fact that in the present act Congress departed from the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 605, 628; 28 Op. 358), which required the contract for the construction of vessels authorized therein to contain a clause requiring said vessels to be built in accordance with the provisions of the act of August 1, 1892 (27 Stat. 340), and the latter act inhibits laborers upon any of the public works of the United States from being required or permitted to work more than eight hours in any one calendar day. But the reason for this departure, I think, was not to make the eight-hour restriction any the less prohibitive, but to make the provisions in regard to an eight-hour day more effective by prohibiting the expenditure of the appropriations unless it was complied with.

The eight-hour provisions in the present statute were added by way of amendment to the naval appropriation bill after it was reported to the House, and the statements of the Members who propounded or were interested in them indicate that they were intended to apply the eight-hour restriction of the act of August 1, 1892, to the construction of the vessels authorized or some of them (46 Cong. Rec. 3085, 3092, 4036). So the conference report on the bill stated that Senate amendments Nos. 56 and 57 "restrict the *eight-hour law* to the construction of battle-ships under the appropriation 'Construction and machinery,' and the House recedes" (ib. 4276).

The underlying purpose of all this legislation is to confer upon workmen the benefits, physical and moral, supposed to flow from a reduction of their labor to eight hours a day; not to increase their wages by enabling them to secure additional pay, if practicable, for working more

than eight hours a day. Such statutes are paternalistic in character, and it is not intended that their benefits should be nullified through contracts made by the beneficiaries.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE SECRETARY OF THE NAVY.

---

CONSTRUCTION OF NAVAL VESSELS—MODIFICATION OF  
CONTRACTS.

The Secretary of the Navy may insert in the contracts for vessels constructed under authority of the act of March 4, 1911 (36 Stat. 1265), a provision for making changes in said contracts and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or unliquidated damages.

DEPARTMENT OF JUSTICE,  
*December 21, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, in which you request my opinion—"as to whether, if the contracts for the construction of the vessels authorized by the act of March 4, 1911, contain a provision for changes in the plans and specifications and in the contracts themselves and for payment on account thereof in a manner prescribed, the amounts claimed by contractors as a result of such changes would be of the nature of unliquidated damages, and whether this department may legally embody in such proposed contracts a provision for making changes in the plans and specifications and the contracts themselves and for determining the increased or decreased compensation allowable for such changes and make payment on account thereof accordingly."

In the case of *United States v. Corliss Steam Engine Company* (91 U. S. 321, 322, 323) the Supreme Court, in sustaining a settlement made by the Secretary of the Navy of a claim for damages, both liquidated and unliquidated, said:

"\* \* \* The power of the President in such cases is, of course, limited by the legislation of Congress. That

legislation existing, the discharge of the duty devolving upon the Secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem, that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in shipbuilding and steam machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors."

In *United States v. Cramp & Sons Co.* (206 U. S. 118) the Supreme Court held that a release executed by the contractor, in pursuance of a clause *in the original contract*, covered both liquidated and unliquidated damages.

The opinions of this office have been substantially to the same effect. (18 Op. 101; 21 ib. 207; 28 ib. 121.)

The authorities show that the powers of the Secretary of the Navy, in regard to making, modifying, and suspending contracts for the construction of vessels of war are such as are adapted to the necessities of the situation and include the right to provide in such contracts for any contingencies which may be expected to arise. Where no provisions of law limit them they are fully as great as the powers of an individual under the same circumstances. They are certainly ample enough to justify such an ordinary, if not necessary, provision as that which you desire to insert.

It may be true that the heads of executive departments have no power to settle claims for unliquidated damages (*Wm. Cramp & Sons v. United States*, 216 U. S. 494), but the rule has never, so far as I am aware, been extended beyond the settlement of claims arising out of a breach of the contract. It does not follow that the head of a department may not insert *in the contract itself* a provision for making changes therein and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or of unliquidated damages.

I have the honor, therefore, to advise you that, in my opinion, the provision which you desire to insert in the contracts for vessels constructed under the authority of the act of March 4, 1911 (36 Stat. 1265), would be entirely legal.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE SECRETARY OF THE NAVY.

---

SELECTION OF SURGEON GENERAL OF THE PUBLIC  
HEALTH AND MARINE-HOSPITAL SERVICE.

The President in selecting a Surgeon General of the Public Health and Marine-Hospital Service is not restricted by law to the list of commissioned officers in the Medical Corps of that service.

DEPARTMENT OF JUSTICE,  
*December 21, 1911.*

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, requesting an opinion on the question whether the law restricts the President, in selecting a Surgeon General of the Public Health and Marine-Hospital Service, to the list of commissioned officers in the Medical Corps of that service, or leaves him free to select a Surgeon General from other sources.

The answer to your inquiry appears to depend solely on the proper construction of "An act to regulate appointments in the Marine-Hospital Service of the United States,"

approved January 4, 1889 (25 Stat. 639), which, in its entirety, is as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That medical officers of the Marine-Hospital Service of the United States shall hereafter be appointed by the President, by and with the advice and consent of the Senate; and no person shall be so appointed until after passing a satisfactory examination in the several branches of medicine, surgery, and hygiene before a board of medical officers of the said service. Said examination shall be conducted according to rules prepared by the Supervising Surgeon General and approved by the Secretary of the Treasury and the President.

"SEC. 2. That original appointments in the service shall only be made to the rank of assistant surgeon; and no officer shall be promoted to the rank of passed assistant surgeon until after four years' service and a second examination as aforesaid; and no passed assistant surgeon shall be promoted to be surgeon until after due examination: *Provided,* That nothing in this act shall be so construed as to affect the rank or promotion of any officer originally appointed before the adoption of the regulations of eighteen hundred and seventy-nine; and the President is authorized to nominate for confirmation the officers in the service on the date of the passage of this act."

In order that the real intent of Congress in passing the above act may be fully appreciated, it is essential to have in mind the condition prevailing at that time in the Marine-Hospital Service as to the appointment and promotion of the Supervising Surgeon General and the medical officers therein. There was, at that time, no specific provision of law at all for the appointment or promotion of any officer in that service except the Supervising Surgeon General. By the act of March 3, 1875 (18 Stat. 371, 377), the latter officer was to be appointed *by the President, by and with the advice and consent of the Senate*; and the class from which he should be selected was not restricted in any respect. The appointment and promotion of the *medical officers*, as distinguished from the Supervising Surgeon

General, were governed merely by the Regulations of the Marine-Hospital Service for 1879, according to which the "medical officers" in the "service" were to be appointed by the Secretary of the Treasury, *upon the recommendation of the Supervising Surgeon General* (par. 23); "original appointments of medical officers in the United States Marine-Hospital Service" were to be made "to the grade of assistant surgeon only" (par. 24); assistant surgeons were to be appointed only on certain conditions, and after a satisfactory examination (par. 26); assistant surgeons were entitled to be promoted to passed assistant surgeons after three years' service and a satisfactory examination (par. 30), and the grade of surgeon was to be filled by promotion from among the passed assistant surgeons (par. 31).

These regulations evidently made a clear-cut distinction between the Supervising Surgeon General—who is appointed by the President from any class of surgeons and is not necessarily selected from the service nor subject to an examination—and "the medical officers" who are not regularly commissioned who, after an original appointment to the grade of assistant surgeon, are promoted from that grade *to the grade of surgeon by regular steps*.

This preexisting, well-established distinction between the Supervising Surgeon General and "the medical officers" as to the mode of appointment and promotion is vital to a correct construction of the act of 1889, because it appears that that act was passed entirely at the instance of the Secretaries of the Treasury, and of the Supervising Surgeons General of the Marine-Hospital Service, *in order to put into the form of specific provisions of law the regulations of 1879*. In a letter dated January 13, 1880, Supervising Surgeon General Hamilton said (19 Cong. Rec. 8550):

"Experience has shown the present system—*the one recommended in the bill and already in practice by the department*—to be that best adapted to carry out the purpose of the founders of the law and that most creditable to the Government."

On February 6, 1886, Mr. Manning, Secretary of the Treasury, wrote (ib. 8551):

"It appears that there is at the present time no law specifically regulating the appointment of *medical officers* in the Marine-Hospital Service, and the appointments are made in accordance with the general authority conferred on the Secretary of the Treasury, to direct the affairs of the Marine-Hospital Service.

"Hence the propriety of the passage of an act regulating these appointments.

"An examination of the text of the bill shows it to be substantially a transcript of the regulations of the Department which have been in force since 1879, and which were lately repromulgated and approved by the President under date of April 24, 1885.

\* \* \* \* \*

"Attention is invited to page lii of my annual report for 1885, pages 11 and 12, of the Report of the Supervising Surgeon General \* \* \*."

The report of the Secretary of the Treasury for 1885 contained the following:

"The recommendations of the Surgeon General \* \* \* for the enactment of a statute *in regard to the appointment of medical officers are concurred in.*"

And the report of the Supervising Surgeon General referred to contained the following:

"In the particular of appointments, I have urged for the past six years that *this matter no longer be left to regulations, but that Congress make suitable provision for the appointment of medical officers.*"

In the debate on the bill in the House (ib., 8549-8551), Mr. Crisp, in charge of the bill, said in regard to it:

"Secretaries of the Treasury have recommended it from time to time. It does not increase the pay or number of officers, but merely provides they shall hereafter be appointed by the President instead of by the Secretary. It also allows them to have commissions. The head of the bureau is the only officer in this service now appointed by the President, with the advice and consent of the Senate.

\* \* \* \* \*

"As I understand it, the only officer now in the Marine-Hospital Service who has been appointed by the President and confirmed by the Senate is the Supervising Surgeon General. *This does not affect him at all.*

\* \* \* \*

"\* \* \* My understanding is that the head of the service is the *only one the bill does not affect, he being an officer appointed by the President and confirmed by the Senate, and as I understand it, the sole object is to allow subordinates instead of being appointed as now, by the Secretary of the Treasury, to be appointed by the President and confirmed by the Senate.*

\* \* \* \*

"As I understand it, *this is putting into the form of a law what is simply at the present time a regulation of the department.* If I am correctly informed as to the regulations, these officers may be discharged summarily at any time."

It thus seems clear that the general purpose of the act of 1889 was not to change the method of appointing the Supervising Surgeon General, nor to disturb the distinction recognized by the regulations of 1879 between that officer and "the medical officers" of the service, but merely to legalize the position of *the latter*, to raise *them* to the grade of regularly commissioned officers, and to fix in the law the regulations as to *their* promotion.

A careful consideration of *all* the provisions of the act itself leads to the same conclusion. Evidently the first section of the act does not apply to the Supervising Surgeon General. *He* was already "appointed by the President, by and with the advice and consent of the Senate," and the examination provided for in that section of those appointed under the provisions of the act can hardly be meant for him, since he prepares the rules under which it is to be conducted.

If the Supervising Surgeon General be not included in the first section, it is difficult to see why he should be included in the second. That section is evidently merely a condensed statement of the regulations of 1879, upon the subject of original appointments, examination, and promo-



tion, and we have seen that the Supervising Surgeon General was not subject to the analogous provisions of those regulations. The examinations provided for in the second section are evidently the same as those referred to in the first section, to be conducted under rules of *his* making. The statute, as did the regulations, provides specifically for two classes of promotions, viz, assistant surgeons to passed assistant surgeons, and passed assistant surgeons to surgeons, but is silent as to any promotion of a surgeon to the grade of Supervising Surgeon General. Moreover, immediately after the passage of the act, new regulations were adopted in 1889, approved by the Secretary of the Treasury and by the President, which must be taken to give a contemporaneous executive construction of the act. Those regulations again clearly indicate that the Supervising Surgeon General is, as to his appointment, governed only by the regulations, while the medical officers *alone* are subject to the provisions of the act of January 4, 1889. Paragraph 2 of those regulations says: "The Supervising Surgeon General *will* be selected from among the surgeons when a vacancy occurs in that rank;" while under the heading "Medical Corps," paragraph 7 states, "*The following is the act governing appointments,*" and it then sets out in full the act of January 4, 1889.

Congress itself has apparently given the same construction to the act of January 4, 1889, for in the act of July 1, 1902, to increase the efficiency of the Marine-Hospital Service (32 Stat. 712), in section 1, it is said:

"\* \* \* the Supervising Surgeon General and the officers now or hereafter commissioned under the act of January fourth, eighteen hundred and eighty-nine, entitled 'An act to regulate appointments in the Marine-Hospital Service of the United States,' and acts amendatory thereof, shall hereafter be known as the Surgeon General, surgeons, passed assistant surgeons, and assistant surgeons of the Public Health and Marine-Hospital Service of the United States."

This language seems to distinguish between the "Supervising Surgeon General" on the one side, and the "officers"

on the other, and to imply that the latter *only* are subject to the provisions of the act of January 4, 1889. If this were not the meaning of the first section of the act of July 1, 1902, the natural language would have been "the Supervising Surgeon General and the other officers," etc.

For the reasons stated, I am of the opinion that the law does not restrict the President in selecting a Surgeon General of the Public Health and Marine-Hospital Service to the list of commissioned officers in the Medical Corps of that service.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE SECRETARY OF THE TREASURY.

---

RETURN OF GOVERNMENT CONTRACT—DISCLOSURE OF  
CONFIDENTIAL PLANS.

While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice.

In making the return of a contract on behalf of the Government, as provided for in sections 3744 and 3745 of the Revised Statutes, it is not required to accompany such contract with copies of plans that are confidential and can not be divulged without detriment to the public interests, and the affidavit may except such plans from the return.

DEPARTMENT OF JUSTICE,  
*January 17, 1912.*

SIR: Sections 3744 and 3745 of the Revised Statutes of the United States provide:

"SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts,

to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

"SEC. 3745. It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: 'I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.'"

In your letter of the 12th instant you request my opinion whether the following affidavit by the Assistant Secretary of the Navy, in relation to a certain contract with the Midvale Steel Co., which has been sent you for filing, is in compliance with the law:

"I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with the Midvale Steel Company, represented by Chas. J. Harrah, as president, that I made the same fairly; without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said The Midvale Steel Company, Chas. J. Harrah, or any other person; and that the papers accompanying

include all those relating to the said contract, as required by the statute in such case made and provided, *with the exception of certain plans that are confidential and can not be divulged at this time without detriment to the public interests*, and of the proposals for said forgings, which were filed with contract dated October 17, 1911, with the Crucible Steel Company of America, for furnishing 5-inch gun forgings."

The sufficiency of the return of a contract under the above sections is not a question of law arising in the administration of your department, and therefore is not one upon which the Attorney General is required by section 356 of the Revised Statutes to render an opinion. The duty of reducing to writing and making a proper return to the Returns Office of the Department of the Interior of all contracts made by the heads of departments referred to in section 3744 rests upon each with respect to his own contracts, and the Secretary of the Interior has no jurisdiction over the contracts entered into by the Secretary of War or the Secretary of the Navy because of the fact that returns are to be made to an office in his department.

Section 3746 of the Revised Statutes, however, makes it a misdemeanor, punishable by fine and imprisonment, for an officer who makes any contract to fail or neglect to make return of the same according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control. It is therefore your duty to call apparent violations of this statute to the attention of this department, in order that, if the law has been violated, appropriate criminal proceedings may be instituted for its enforcement. This being so, it is proper that I should advise you whether the case submitted presents a violation of the statute, in order that you may know how to proceed in this respect in the future.

It appears from the affidavit of the Assistant Secretary of the Navy that all the papers relating to the contract with the Midvale Steel Co. have been sent to the Returns Office of your department, "with the exception of certain plans that are confidential and can not be divulged at

this time without detriment to the public interests." The question presented is whether this exception is permissible under the statute.

It will be observed that section 3744 does not specifically mention plans and specifications among the papers required to be returned with the contract. It is usual, however, for such contracts to provide that the plans and specifications shall form a part thereof, and the contract with the Midvale Steel Co. contains such a stipulation. But, assuming that ordinarily where plans and specifications are made a part of the contract, section 3744 requires a return thereof, I am of the opinion that, considering the purpose and effect of the statute, it should not be construed as requiring the disclosure of plans that are confidential and can not be divulged without detriment to the public interests, upon the principle that although within the letter of the statute, it is not within its spirit, and therefore not within the statute (*Church of the Holy Trinity v. United States*, 143 U. S. 457).

The provisions of the Revised Statutes referred to were taken from the act of June 2, 1862 (12 Stat. 411), entitled "An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government." The first three sections of that act were embodied in sections 3744, 3745, and 3746 of the Revised Statutes. The fourth section established the "Returns Office" in the Department of the Interior, and made it the duty of the clerk authorized to be appointed to attend the same to "file all returns made to said office, so that the same may be of easy access"; to keep an index book, with the names of the contracting parties and the number of each contract; to "submit the said index book and returns to any person desiring to inspect the same," and also to "furnish copies of said returns to any person paying for said copies to said clerk, at the rate of 5 cents for every 100 words, to which said copies certificates shall be appended in every case by the clerk making the same, attesting their correctness, and that each copy so certified is a full and

complete copy of said return." These provisions are now embraced in sections 512 to 515 of the Revised Statutes.

It is manifest from the provisions quoted that if the Secretary of War and the Secretary of the Navy are required, in making returns of contracts made by them for the construction of things authorized for the national defense, such as vessels of war, fortifications, armor, and armament, to accompany such contracts with copies of the plans and specifications, secrets pertaining to the national defense will be exposed to public view. Clearly, Congress could have had no such intention. Moreover, such a view would be contrary to the policy expressed by Congress in the act of March 3, 1911 (36 Stat. 1084), entitled "An act to prevent the disclosure of national defense secrets," which penalizes the unauthorized disclosure of information of this character.

The purpose of the statute with reference to making returns was, as the title thereof stated, "to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government." This object Congress aimed to accomplish by requiring the data with respect to the making of such contracts—bids, offers, proposals, and advertisement—to be filed with the contract, and making the whole of it open to public inspection. Such an inspection would show whether the provisions of law governing the making of any such contract had been complied with. But there is nothing in the purpose to be subserved that requires the disclosure of details respecting the subject matter of the contract which the interests of the Government demand should be kept secret.

I have the honor to advise you, therefore, that in my judgment the return of the Secretary of the Navy as to the contract of the Midvale Steel Co. is a sufficient compliance with the law.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

ACCEPTANCE OF OFFICE IN NATIONAL GUARD OF A STATE  
BY OFFICER ON ACTIVE LIST OF THE REGULAR ARMY.

An officer on the active list of the Regular Army may accept the office of colonel in the National Guard of a State, without violating the provisions of section 1222 of the Revised Statutes. While contemporaneous and long-continued departmental construction of an ambiguous statute is entitled to very great weight, it is quite otherwise where the statute is clear and there is no need for the assistance derived from that source.

DEPARTMENT OF JUSTICE,  
*January 31, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 11th ultimo, in which you request my opinion upon the question "whether an officer on the active list of the Regular Army may accept the office of colonel in the National Guard of the State of Massachusetts, without violating the provisions of section 1222 of the Revised Statutes, and without incurring the penalties named therein."

Said section is as follows:

"SEC. 1222. No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

This section is taken from an act approved July 15, 1870 (16 Stat. 319), and originally was part of a bill to reduce the Army, after the Civil War, and was one of many provisions, all dealing with the number, rank, pay, and duties of the members of the military forces (H. R. 987, 41st Cong., 2d sess.). Gen. Logan, chairman of the Committee on Military Affairs, from which the bill was reported, in explaining this provision to the House (Cong. Globe, 41st Cong., 2d sess., Appendix, p. 150), said:

"\* \* \* We think if a man has a commission in the Army, that should be sufficient for him, and he should not hold two offices at the same time, the one a civil and the other a military office, when bad conduct in one will not vacate both.

"Let me illustrate. Suppose a colonel of the Army to-day is appointed by the President to some civil office; he accepts the office, and while serving in it he does some act which leads the President to turn him out and put in some one else. He then falls back on his rank as colonel in the Army; he can not be court-martialed for what he has done, for he did it as a civil officer, \* \* \* and therefore is not responsible as a military officer for what he did."

\* \* \* \* \*

"Hence, I say that the two offices are incompatible with the good of the country and should not exist."

And he pictures the evil which the provision was intended to forestall to be that the military power would "grow to be paramount to the civil, instead of the civil being paramount to the military."

It is thus clear that Congress used the term "civil office" in section 1222 in contrast to the term "military office." An "officer of the Army," holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other.

The term "civil office" was not a new one in congressional legislation. The Oregon act of August 14, 1848 (9 Stat. 325), in section 5, after prescribing the qualification for electors in the Territory, contained the following limitation thereon:

"\* \* \* *And provided further*, That no officer, soldier, seaman, or marine, or other person in the Army or Navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote in said Territory, by reason of being on service therein, unless said Territory is and has been for the period of six months his permanent domicil: *Provided further*, That no person belonging to the Army or Navy of the United States shall ever be elected to or hold any civil office or appointment in said Territory."

The Washington act of March 2, 1853 (10 Stat. 174), section 5, contained the same language. Can the term "civil office," in the above acts, connected as it is with pro-



visions regulating the franchise, and limiting the right of persons connected with the Army or Navy of the United States to the exercise of such franchise, possibly mean anything else than an office concerned with civil pursuits? Can it be held to include the militia of the Territory? The very necessities of those Territories, their distance from the central Government, their constant liability to conflicts with the Indians, disprove such a construction.

The above provisions of the Oregon act are carried into the Revised Statutes as section 1860, which likewise is a section dealing with the questions of suffrage and office holding in a civil government. Section 1860, Revised Statutes, was amended by the act of March 3, 1883 (22 Stat. 567), by excepting from its prohibition "officers of the Army on the retired list." In arguing against a precisely similar amendment, Senator Plumb, of Kansas, said (Cong. Record, vol. 15, pp. 525, 526) :

"I do not want to see those instruments which we keep up for the destruction of human life ever put into that civil employment, which concerns itself with the productive power of the country, with the arts of peace, and with the performance of the peaceful functions of government."

In addition, sections 1223 and 1224 of the Revised Statutes, the one forfeiting the office of an Army officer who accepts a diplomatic or consular appointment, and the other prohibiting certain clearly civil engagements by Army officers, both enforce the conclusion that the line Congress means to draw is between "civil" office and "military" office, and to prohibit the crossing of this line or the union of the latter with the former taken in this contrasted sense.

The Supreme Court of the United States had these sections under consideration in Gen. Badeau's case (130 U. S. 439, 449), where the court said :

"Thus in the acts of 1868 and 1870, and in sections 1222 and 1223 of the Revised Statutes, Congress distinguished, and adhered to the distinction, between officers on both lists and officers on the active list only, and between *ordinary civil appointments and appointments in the diplomatic or consular service*. No officer, whether on the active or retired list, could accept appointment in the latter, and re-

main an officer, but that rule was not applied to retired officers in the matter of *holding a civil office*."

This language shows that the Supreme Court considered the "civil office" of Revised Statutes, section 1222, as the same in kind, though differing in certain legal results, as the diplomatic or consular appointment of section 1223. And Attorney General Akerman, in an opinion rendered immediately after the passage of the act (13 Op. 310), declares the "manifest purport" of section 1222 to be "to disencumber Army officers of every species of official duty *not belonging to their military profession*." The same view is evidently implied in the opinion of Chief Justice Nott (*Geddes v. United States*, 38 Ct. Cls. 428, 446), by Attorney General Devens (15 Op. 306, 407, where he speaks of "a purely civil office"), by the Senate Committee on the Judiciary (S. Report No. 429, 47th Cong., 1st sess.), and by the State courts (*State v. Clarke*, 21 Nev. 333).

The above considerations and authorities seem ample to justify the conclusion that the term "civil office" in Revised Statutes 1222 means an office, whether State or Federal, whose sphere is in the ordinary peaceful government of the country, which is subject to the *ordinary* customs, rules, and laws, of that government, as distinguished from a "military office," engaged with the arts of war and governed, under courts-martial, by the Articles of War.

It is true that, on May 26, 1879, Gen. W. M. Dunn, then Judge Advocate General of the Army, having before him the question whether or not a lieutenant in the Regular Army could accept a command of a battalion of militia, rendered the following decision:

"Under the provisions of section 1222 Revised Statutes this officer can not legally be appointed to the *civil office* within mentioned; and, moreover, that he could not exercise the functions of the same without vacating his commission in the Army. Of course, *any* office (State or Federal) other than an office in the military or naval service of the United States, is a 'civil office' in the sense of the statute"—

and that this decision of Gen. Dunn has been uniformly followed and enforced by the War Department from that

time to the present, a period of over 32 years. Nevertheless, while such a contemporaneous, and long-continued departmental construction is entitled to very great weight, where the law is ambiguous (*Schell v. Fauché*, 138 U. S. 562, 572; *Pennoyer v. McConnaughy*, 140 U. S. 1, 23), it is quite otherwise where, the law being clear, there is no need for the assistance derived from this source. (*Swift Co. v. United States*, 105 U. S. 691, 695; *United States v. Graham*, 110 U. S. 219, 221; *Studebaker v. Perry*, 184 U. S. 258, 269; *Cooley*, Constitutional Limitations, 6th ed., p. 84.) In my opinion, there can not fairly be said to be any ambiguity in section 1222, Revised Statutes, and, therefore, the construction placed thereon by the War Department, while entitled to respectful consideration, is not controlling, and, in this case, should not be followed.

It would be unjustifiable to argue at length that the office of colonel in the National Guard of Massachusetts is not a "civil office" in the sense indicated above. The Organized Militia has a twofold relation, the one to the National, the other to the State government. In the former aspect, its functions, as stated in the Constitution, article 1, section 8, are "to execute the laws of the Union, suppress insurrections, and repel invasions." As a national force, it is now governed by the act of January 21, 1903 (32 Stat. 775), and the briefest inspection of that act shows that the Organized Militia provided for therein, in organization, equipment, discipline, and functions, does not differ in any essential respect from any other military force. Nor is the case different as to the relation of the militia to the States. For example, in Massachusetts, its functions, as set out in section 15 of the militia act of June 11, 1908, are "to resist invasion, to quell insurrections, and to *aid civil officers* in the suppression of riots, in the execution of the laws, or in time of public danger." It is governed by the Articles of War (ib. sec. 190), is subject to courts-martial (ib. secs. 179-190), and, in general, is a force whose whole end and purpose is military, as distinguished from civil.

I have the honor, therefore, to advise you that, in my opinion, an officer on the active list of the Regular Army may accept the office to which you refer without violating

the provisions of section 1222 of the Revised Statutes. Whether the acceptance by an officer of the Army of an office in the National Guard of a State would be inconsistent with the policy expressed in the Constitution and laws of the United States with respect to these two establishments, and whether there are not reasons other than those contained in section 1222 of the Revised Statutes, which would make it illegal or improper for an officer of the Army to subject himself to conflicting State jurisdiction, are matters upon which I express no opinion.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

---

**FOREST RESERVES—AUTHORITY TO GRANT RIGHTS OF WAY FOR ELECTRICAL, TELEPHONE AND TELEGRAPH PURPOSES.**

The authority to grant easements for rights of way for electrical, telephone and telegraph purposes, as contemplated by the agricultural appropriation act of March 4, 1911 (36 Stat. 1253), is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the national forests.

DEPARTMENT OF JUSTICE,

*February 3, 1912.*

SIRS: The agricultural appropriation act of March 4, 1911 (ch. 238, 36 Stat. 1253), provides:

“That the head of the Department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by

such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the Department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the Department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

“That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.”

You have joined in requesting to be advised whether upon a proper construction of this provision the function of granting the rights of way devolves upon the Secretary of the Interior or the Secretary of Agriculture, when the lands to be affected lie within the confines of forest reservations.

The question involves primarily the construction of the words, “the head of the Department having jurisdiction over the lands,” in which the term “jurisdiction” is to be taken, of course, in a sense in which it is loosely but not uncommonly employed as denoting in a general way executive authority under the laws applicable to the subject matter in mind.

At the time of the passage of this act such a jurisdiction in respect of forest lands existed in the Secretary of Agriculture for certain purposes, and also in the Secretary of the Interior for certain other purposes. This division of jurisdiction was brought about by the act of February 1, 1905 (ch. 288, 33 Stat. 628), prior to which the execution of the laws relating to established forest reservations, as of the laws relating to the unreserved public lands, was

confided to the Secretary of the Interior. That act, however, declared that thereafter the Secretary of Agriculture should execute, or cause to be executed, all laws affecting the public lands, reserved or to be reserved as forest reservations, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands."

Construing this statute, the Secretary of the Interior, in a letter to the Secretary of Agriculture of June 8, 1905, observed:

"I have to advise you that it is believed the respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely, that your department is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this department retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by your department is subject to any later disposal of the land by this department. Within the limits of the separate jurisdictions herein defined, it is believed that the actions of the two departments will proceed harmoniously. (33 L. D. 609, 610.)"

The view thus set forth seems to have received the express approval of the Secretary of Agriculture. It was at once accepted, and has since been consistently acted upon by both departments.

In 28 Op. it was said (p. 524) that:

"The jurisdiction conferred upon the Secretary of Agriculture by the act of February 1, 1905, \* \* \* is essentially a jurisdiction to care for, supervise, and manage the national forests as distinct instrumentalities of the Government—as 'going concerns'—and to execute certain laws relating to them."

And that (p. 525) :

“The laws which the Secretary [of Agriculture] is to execute are manifestly the laws which declare the general policy respecting forest reservations and govern their administration and use as such apart from the general mass of public lands.”

Without attempting to review those laws in detail, as they were when the act now under consideration was passed, it seems enough for present purposes to observe that, while they cast upon the Secretary of Agriculture the duty of protecting and fostering the forests and empowered him to regulate their use and occupation and to sell and in other ways dispose of the timber, they did not authorize through his action the granting or conveying of any estate or interest affecting the title to the lands themselves. On the other hand, where title might be acquired to lands within such reservations, as under the general mining laws, and where rights of way in the nature of easements might be obtained, as for wagon roads and railroads (act of Mar. 3, 1899, 30 Stat. 1233), it was the Secretary of the Interior who, by plain intent of the act of February 1, 1905, *supra*, was to officiate for the Government in the transaction. Thus while the revocable concessions or permits, in the nature of licenses, to use lands for the various purposes specified in the act of February 15, 1901 (ch. 372, 31 Stat. 790), were to be passed upon and given or withheld by the Secretary of Agriculture where forest reservations were concerned, the act of February 1, 1905 (the same which gave him that authority), itself provided that “rights of way” within and across the forest reserves for the construction and maintenance of reservoirs, canals, etc., for municipal or mining purposes, and for the milling and reduction of ores, might be granted, “during the period of their beneficial use,” by the Secretary of the Interior.

On the part of the Secretary of the Interior it is therefore urged that, as the legislation now in question provides for the granting of easements—incorporeal estates, though of limited duration—and as the “jurisdiction” to which it refers was a jurisdiction already existent when the legisla-

tion was passed, Congress, by the expression "head of the department having jurisdiction over the lands," must have intended to designate the head of the Department of the Interior to grant the new easements as well within the forest (and all other) reservations as over the unreserved public lands, since the contrary view would involve a departure from the consistent policy of Congress which, for very many years, has entrusted to the Secretary of the Interior, not only the guardianship over the public lands generally, but also, and peculiarly, execution of all general laws which enable individuals and corporations to acquire under various conditions titles and vested interests in lands from the United States. Furthermore, it is said, a division of this disposing authority, by distributing the records of transactions dealing with title among two or more departments of the Government, would occasion needless uncertainty and inconvenience, particularly in regard to land passing from one status to another by inclusion within or exclusion from a reservation.

These suggestions would be very persuasive if the statute did not expressly undertake to assign the new authority to any department; but logically followed out in the case before us they reduce the descriptive phrase, "head of the department having jurisdiction over the lands," to mere synonymity with "Secretary of the Interior," and the question at once occurs: If Congress had in mind a quality of jurisdiction which only the Secretary of the Interior was then enjoying and purposed to vest the new jurisdiction in him alone, why did it not simply say, "Secretary of the Interior," instead of resorting to a doubtful and wholly unnecessary circumlocution? Upon their face the words suggest a generic application; indeed, unless we are prepared to believe that Congress did not understand the existing powers of the Secretary of the Interior, or took no care whatever to express itself in natural and direct language, it seems impossible to confine this expression specifically to that official in the face of the fact that the heads of other departments also may not unreasonably be included. Leaving out of view the peculiar authority to pass title, and without attempting a complete-



ness of enumeration, there was, as we have seen, a jurisdiction in the Secretary of Agriculture over the lands of forest reservations; there was an analogous jurisdiction in the Secretary of the Interior over the unreserved lands, and the lands reserved as Indian reservations, abandoned military reservations, and national parks; and there was an analogous jurisdiction in the Secretary of War over the lands of active military reservations. These three heads of departments, at least, were vested with separate, independent authorities of supervision, regulation and control "over" lands of these several and respective categories. Unquestionably the statute applies to all such lands; and there is no obstacle in reason, as there certainly is not in the language, to its application to the heads of the departments which possessed this authority or jurisdiction over them.

It has been argued that the acceptance of this view is opposed by the proviso—

"That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only *upon approval of the chief officer of the Department under whose supervision or control such reservation falls*, and upon a finding by him that the same is not incompatible with the public interest."

The contention is that the words "chief officer of the department" are here equivalent to the words "head of the department," and that consequently if the latter were construed as I have just indicated they should be, the proviso would be in effect nullified if not rendered nonsensical, since it would amount to no more than a direction to the granting official to approve of a proposed grant before making it, which, it is intimated, he would be bound to do in any event. This proviso is copied almost bodily from the act of February 15, 1901, *supra*, which authorized the Secretary of the Interior under general regulations to permit the use of rights of way for certain specified purposes "through the public lands, forest, and other reservations of the United States" and certain specified national parks. The proviso in that enactment is:

“That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest.”

As the two statutes are so closely associated *in pari materia*, the one may be resorted to to elucidate the other, and owing to the close similarity of the language used I do not doubt that the provisos should be taken under similar constructions. Under the act of February 15, 1901, the power to grant the permits was expressly confined to the Secretary of the Interior, who at that time was the guardian not only of the public lands but also of all of the parks named and classes of reservations expressly mentioned in that proviso, save only the active military reservations. Nevertheless the proviso required as a condition to the granting of a permit within any of those parks and reservations the prior approval of the “chief officer of the department” having supervision thereof, and a finding by him of compatibility with public interest. It seems to have been assumed by the departments which have been called upon to administer that law that “chief officer of the department” there is equivalent to “head of the department.” Conceding this to be correct, we must also concede that, by the plain intention of the older statute, before a permit under it could be allowed within a forest or Indian reservation or within one of the national parks mentioned, it must be subjected to scrutiny by the Secretary of the Interior and be found by him to consist with the public interest. In other words, the old statute, so construed, required the very thing which, it is now argued, would be useless or unreasonable in the new one.

The purpose of the proviso, in each case, was doubtless to declare and emphasize the desire of Congress that no concession should be allowed within a reservation or park until after its possible effects upon the public objects and interests subserved by that reservation or park had been examined into with particular care. Congress may well

have thought that the applicant's mere compliance with the general regulations would not be enough in such cases, though it might be where unreserved lands only were concerned. If this be not the true construction of the proviso in the earlier act, the only possible alternative would seem to lie in interpreting the term "chief officer" as meaning not a department head, but some other official who, while of less degree, is nevertheless invested with important and direct supervising authority over the park or reservation in question. There are verbal difficulties in the way of this latter view, but they need not be closely considered here, since, if it be adopted, the objection we are now discussing necessarily disappears.

Assume, then, that the term "chief officer of the department" as used in the earlier law means the head of the department. Plainly, the Secretary of the Interior was included in it, in so far as that law applied to the reservations and parks over which he had supervision. That the earlier and later provisos should be construed in the same sense appears to me to follow clearly both from their substantial identity and because the same considerations which lead to the construction in the one case are independently applicable in the other. The national parks and Indian reservations are expressly mentioned in the later proviso, and as these fall ultimately under the supervision and control of the Secretary of the Interior, the proviso must apply to him in part, whether his power to grant easements be or be not exclusive.

The history of this legislation of March 4, 1911, serves to corroborate the conclusion that the function of granting easements is not confined to the Secretary of the Interior. It began with Senate bill No. 7713, introduced April 13, 1910 (45 Cong. Rec. 4594), which was reported by the Senate Committee on Public Lands January 13, 1911, with amendments (46 Id. 837; Senate Rep. No. 967, 61st Cong., 3d sess.), and as so reported passed the Senate January 21, 1911 (Id. 1216). As thus passed that bill was identical with the legislation before us except in these particulars: The second proviso authorizing forfeitures to be declared

for nonuse or abandonment was omitted; the width of the right of way authorized was 10 feet on each side of the center line; the first proviso was identical with the like proviso in the act of 1901, *supra*, even to the extent of using the word "permit" instead of "right of way"; the term of the easements was made 50 years instead of "not exceeding fifty years," and lastly and principally, the granting power was lodged in the Secretary of the Interior, *eo nomine*.

The object of the bill was explained in the Senate committee's report as follows:

"The committee finds that under the existing law and regulations the only right of way that can be obtained for electrical lines for the transmission of power across the public domain and national forests is a temporary revocable permit issued by the Secretaries of the Interior and Agriculture. That under the present conditions, in many cases, it is impossible for companies interested in the development of power outside of the limits of national forests to successfully raise the necessary money for the construction work where the tenure of the right of way across public lands and national forests is subject at any time to be revoked by an administrative officer of the Government. The committee is unanimously of the opinion that the legislation called for in the bill should receive immediate and favorable consideration."

On February 15, 1911, the bill was reported favorably by the House Committee on Public Lands, with amendments changing "ten" to "twenty" and "permit" to "right of way," and adding a proviso that "all or any part of such right of way may be forfeited and annulled by declaration of the *Secretary of the Interior* for nonuse for a period of two years or for abandonment." (46 Cong. Rec. 2634; House Rep. 2177; 61st Cong., 3d sess.). The Senate committee's explanation was adopted in the House report.

The legislation next appeared in the Senate as an amendment to the Agricultural appropriation bill of March 4, 1911, precisely as it now stands, with the exception that "Secretary of Agriculture" occupied the place of "head of the department having jurisdiction over the lands" both at the beginning and in the last proviso (46 Cong. Rec.

3777). When that bill came before the House after conference, the words "Secretary of Agriculture" in the last proviso had been replaced by "Secretary of the Interior," so that the power to make the grants inside or outside of reservations or parks would have been lodged in the former, and the power to forfeit them in the latter. Pursuant to recommendations by the House conferees, acceded to by the conferees of the Senate, the words "head of the department having jurisdiction over the lands" was substituted in both places and the legislation was enacted in its present form (Id. 4014).

It is hardly possible to ignore the significance of these legislative changes. They show, beyond a doubt, that whether the authority to grant the easements should be lodged exclusively with one department, was a question directly considered by Congress and answered by the adoption of an expression properly applicable to several departments.

It is worthy of notice, too, that by section 18 of the act of March 3, 1891 (ch. 561, 26 Stat. 1101), which, with the three sections following it, relates to the acquisition of easements for irrigation canals and reservoirs upon the public lands and reservations, it was provided:

"That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the *Department of the Government having jurisdiction of such reservation.*"

No one will question the intention there to refer, by the words italicized, to the departments having immediate supervision and control over the reservations concerned. The statute is quite closely related to the one now under consideration, and, so far as I am aware, is the only other one of like character in which this expression "department having jurisdiction" has been employed by Congress. The practical identity of language naturally indicates an identity of meaning, and this serves to fortify the conclusion which I am impelled to express in this opinion.

In view of the premises I do not feel that the possible inconvenience of dividing the records of these grants among two or more departments can be conceded any weight in determining the result. Should inconvenience arise in practice, a means of overcoming it may easily be devised by Congress, if not by the executive departments themselves.

I have the honor to advise you that the authority to grant the easements contemplated by the legislation set forth at the beginning of this opinion is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the national forests.

Very respectfully,

ERNEST KNAEBEL,  
*Assistant Attorney General.*

Approved.

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR and  
The SECRETARY OF AGRICULTURE.

---

APPOINTMENT TO POSITIONS IN OTHER DEPARTMENTS  
OF EMPLOYEES TRANSFERRED TO CENSUS OFFICE.

Employees transferred to the Census Office from other branches of the departmental classified service, under section 7 of the census act of July 2, 1909 (36 Stat. 3), are eligible to appointment in any of the departments to positions of the same class or grade as those held by them at the date of their transfer to the Census Office, but not to higher positions.

DEPARTMENT OF JUSTICE,  
*February 6, 1912.*

SIR: I have the honor to respond to the note of your secretary of the 31st ultimo, communicating your request for my opinion as to the proper construction of the following proviso in section 7 of the census act of July 2, 1909 (36 Stat. 1, 3):

"\* \* \* \* And provided further, That employees in other branches of the departmental classified service who

have had previous experience in census work may be transferred without examination to the Census Office to serve during the whole or a part of the decennial census period, and at the end of such service the employees so transferred, shall be eligible to appointment to positions in any Department held by them at date of transfer to the Census Office, without examination \* \* \*."

It appears from the papers transmitted to me that the Secretary of Commerce and Labor recently requested the Civil Service Commission to approve the transfer to the Bureau of Manufactures in his department of a clerk now serving in the Census Office as the result of a transfer from the Treasury Department. The commission has refused to sanction the proposed transfer on the ground that under the proviso above quoted such clerk must be first transferred back to the Treasury Department before he can become eligible to transfer to your department.

An examination of the legislative history of the proviso of the census act in question leads me to the conclusion that the Civil Service Commission has placed too narrow a construction upon its language.

This proviso, previous to the form in which it was finally enacted, provided, with respect to the employees authorized by it to be transferred to the Census Office from other branches of the departmental classified service, that at the conclusion of their services in the Census Office they should "be eligible to appointment to positions of *similar grade in any department* without examination." (44 Cong. Rec. pt. 1, p. 91.) This was construed by some Members of the House, when the bill was under consideration, to mean that such employees could be transferred back to the department from which they came at a compensation equal to that received by them in the Census Office, wherein their promotion might be unduly rapid, and thus "by only a short service in the Bureau of the Census get high promotion in the departments." Therefore, it was moved that the words "of similar grade" be stricken out and the words "held by them at the date of transfer to the Bureau of the Census" be inserted after the word "department" (ib. 94). On the other hand, the proposed amendment

was combated upon the ground that it was unfair to the transferred employees, who, it was said, were entitled to some consideration in respect to promotion on account of any service which they might render in the Census Office (ib. 94, 95).

The amendment was adopted, but neither in its original nor amended form did the proviso in question purport to restrict the right of appointment granted to the particular department from which the employees referred to were transferred. The words "in any department" were still retained in the proviso as amended. It is true the Members of the House participating in the discussion of the amendments seem to have had in mind the return of the transferred employees to the same department. But that was not the point at issue, and the language of the act is not so limited. If the statute were narrowly construed, it would limit the appointment of a transferred employee to the identical position in the particular department from which he was transferred to the Census Office. But manifestly Congress did not have such an intention, as it could not be expected that that identical place could or would be held open for him. Besides, this would be reappointment, whereas the right granted is the broad one of appointment. The real purpose of the proviso, as finally enacted, was, I think, to authorize one who had been transferred to the Census Office from another branch of the departmental classified service to be appointed, without examination, to a position in any of the departments of the same class or grade as that held by him at the date of his transfer to the Census Office, but not to a higher position. I can perceive no good reason for adopting a construction which would deprive such an employee of the status as to appointment or transfer to which his former position in the classified service entitled him. On the contrary, the manifest purpose of the proviso was to protect such employees from being injured in these respects by reason of their transfer to the Census Office.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.



316 *Postal Savings System—Duplication of Accounts.*

POSTAL SAVINGS SYSTEM—DUPLICATION OF ACCOUNTS—  
EXCHANGE OF DEPOSITS FOR POSTAL SAVINGS BONDS.

A person is prohibited by section 4 of the postal savings depositories act of June 25, 1910 (36 Stat. 815), from having more than one deposit account with the postal savings system.

As the opening of a second postal savings account is unauthorized, it can not be treated as a proper basis for the exchange of deposits for postal savings bonds under the provisions of section 10 of the above-mentioned act.

DEPARTMENT OF JUSTICE,  
*February 7, 1912.*

SIR: I have your favor of 3d instant, in which you advise me that on July 31, 1911, a resident of Hanford, Cal., opened an account at the postal savings depository at that place and accumulated deposits amounting to \$300; that subsequently he moved to Corcoran, Cal., where on November 6 he opened another account and made deposits which by December 2 amounted to \$200; that this duplication of accounts came to light through applications filed by the depositor for postal savings bonds at both the Hanford and Corcoran offices, he having requested \$300 worth of bonds at the former and \$200 worth at the latter place; that while no deposits were made at the Hanford office after the account was opened at Corcoran, and in no instance did he exceed the maximum amount authorized by law to be deposited monthly, the question arises as to whether the depositor is to be regarded as having violated that part of section 4 of the act of June 25, 1910 (36 Stat. 815), which provides that "no person shall at the same time have more than one postal savings account in his or her own right," and you ask an expression of my opinion on this subject.

In my opinion it is quite clear that the depositor had no right to open the deposit account at Corcoran, Cal. At the time of opening it he had one deposit account with the postal savings system, to wit, that at Hanford, and the opening of the second account was in absolute violation of the provision quoted in your letter from section 4 of the postal savings act of June 25, 1910. Section 14 of that act empowers the Postmaster General to make, and, with the approval of the board of trustees, to promulgate such rules and regulations not in conflict with law, as he may

deem necessary to carry the provisions of the act into effect. By the amendment of March 4, 1911 (36 Stat. 1340), it is further provided that the Postmaster General—

“shall also from time to time make rules and regulations with respect to the deposits in and withdrawal of moneys from postal savings depositories and the issue of pass-books or such other devices as he may adopt as evidence of such deposits or withdrawals, and the provisions of the act approved June twenty-fifth, nineteen hundred and ten, are hereby modified accordingly.”

By virtue of the authority so granted, the Postmaster General did promulgate regulations covering the postal savings system, and these regulations contain provisions respecting the opening of deposits, the payment of interest from them, the evidence to be furnished to the depositor in the shape of certificates of deposit to be issued in his name, etc. Among such regulations are certain instructions to the postmasters at the postal savings depository offices, describing the method of opening an account, and requiring every person who applies to open an account to fill out and sign an application on a certain envelope form prescribed in the regulations, which application must be signed by the person who desires to open the account. The form of application so prescribed contains, among other things, a statement that—

“I hereby make application to open a postal savings account, subject to the rules and regulations prescribed by the Postmaster General, and further state that I have no other postal savings account. Witness my hand this — day of,” and so on.

I am informed by the secretary of the postal savings system that, in the case presented by your letter, the depositor in question, in his application to open his account at Corcoran, Cal., signed an application in the above form, thus representing over his own signature that he had no other account with any postal savings bank, whereas, in fact, he had another account in the postal savings bank at Hanford, Cal. Under these circumstances, I am clearly of opinion that the opening of the second account, namely, that at Corcoran, Cal., was entirely unauthorized, was made in violation of the regulations duly prescribed by

you, was accepted in reliance upon the truth of a representation which was not true, and that as soon as the fact was brought to your attention it was your duty to cause that account to be closed.

You further ask to be advised as to the amount of bonds applied for to which the depositor is entitled.

The second, or Corcoran account, being unauthorized, can not, in my opinion, be treated as a proper basis for the exchange of deposits for postal savings bonds under the provisions of section 10 of the act of June 25, 1910. That section provides "that any depositor in a postal savings depository may surrender his deposit, or any part thereof," in sums designated, and "receive in lieu of such surrendered deposits, under such regulations as may be established by the board of trustees, the amount of the surrendered deposits in United States coupon or registered bonds" in the denominations specified.

This undoubtedly refers to the surrender of a deposit authorized by law, and as the law authorizes a person to have no more than one postal savings account in his or her own right, the privilege which is attendant upon a deposit under the act is confined to the authorized deposit.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

---

TRANSPORTATION OF PASSENGERS INTO FOREIGN WATERS  
AND BACK TO PORT OF DEPARTURE.

The transportation of passengers by foreign vessels from a port in the United States through domestic and foreign waters, sometimes touching at a foreign port, and returning them to the port of departure, is not in violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248).

DEPARTMENT OF JUSTICE,  
*February 12, 1912.*

SIR: I have had under consideration your letter of December 27, 1911, in which you say that in the course of the administration and enforcement of the coastwise shipping laws of

the United States your department finds it necessary, prior to the opening of navigation on the St. Lawrence River and the Great Lakes during the coming season, to deal with a situation brought to its attention toward the close of the season last past, and to issue appropriate instructions to collectors of customs and other officers concerned.

Your letter states that—

“a custom has grown up within recent years on the St. Lawrence River and the Great Lakes, whereby foreign vessels of Canadian ownership have been permitted to take on passengers at United States ports and to transport them on excursions through domestic and foreign waters, returning them to the port of departure. Sometimes these vessels clear from the American port for a Canadian port, in which case the vessel usually makes a call at the latter port long enough to obtain clearance therefrom for the former. When such calls are made at a Canadian port, the passengers are in some cases permitted to land for a short time, and in other cases no such opportunity to land is afforded; but in either case the voyage is practically continuous and the passengers virtually remain with the vessel until her return to the port of departure in the United States. The traffic in question is essentially domestic, since it originates and terminates in the United States, and is supported by the American public, and is only foreign in so far as it passes through foreign ports or waters and is permitted to move in foreign vessels.”

Upon this state of facts you request my opinion—

“whether the transportation by foreign vessels of passengers taken on board in the United States under the circumstances mentioned constitutes a violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248), \* \* \*.”

The amended statute provides:

“SEC. 8. No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed.”

The legislative history of this statute is set out in the opinion rendered you under date of February 26, 1910, in

the case of the *Cleveland* (28 Op. 204), and need not be repeated.

It is manifest that the passenger transportation referred to by you—excursions from United States ports through domestic and foreign waters, sometimes touching at a foreign port, but returning to the port of departure—does not come within the terms of the statute, which deals only with transportation “between ports or places in the United States, either directly or by way of a foreign port.” These words imply a transportation beginning at one port or place in the United States and ending at another port or place therein. So, too, the clause imposing a penalty of \$200 for “each passenger so transported and landed” implies landing at the port or place of destination.

You state, however, that “the traffic in question is essentially domestic, since it originates and terminates in the United States, and is supported by the American public, and is only foreign in so far as it passes through foreign ports or waters and is permitted to move in foreign vessels.” But this is not sufficient to bring the transportation referred to within the act. I know of no authoritative rule of construction which will permit a penal statute to be construed to cover cases not within its terms simply because it may be identical, or substantially identical, in principle with those embraced in the act. The remarks of Mr. Justice Story in *Taber et al. v. United States* (1 Story 1, 6), where it was held that a whaling voyage was not a foreign voyage within the meaning of a statute, are very appropriate in this connection:

“\* \* \* And it is not decisive in a case of this nature, that the mischiefs to be guarded against and remedied by the act of 1803, are equally as applicable to whaling voyages, as to voyages to foreign ports for the general purposes of trade. Where a penalty, or a provision in the nature of a penalty, is to be enforced, the general rule is, that the statute is to be construed strictly; and the language is not to be enlarged to cover a case standing upon similar grounds, if the ordinary interpretation of the terms would not reach it.”

In the recent case of the *United States v. Baltimore & Ohio Southwestern Railroad Co.* (222 U. S. 8, 13), the appropriate rules of statutory construction are thus succinctly stated by Mr. Justice McKenna, in delivering the opinion of the Supreme Court:

"If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity, the character of the Statute determines for a strict or liberal construction. A criminal statute is strictly construed. Courts are not inclined to make 'constructive crimes.'"

In the case before me I am unable to perceive any ambiguity in the statute; certainly none which warrants the construction suggested by the statement that "the traffic in question is essentially domestic, since it originates and terminates in the United States, and is supported by the American public." The answer to this suggestion is that Congress in the statute in question was not dealing with that particular kind of traffic, even if it may properly be classed as domestic, but with transportation of passengers "between ports or places in the United States, either directly or by way of a foreign port." In other words, it was legislating with respect to what is generally termed coastwise traffic, whereas the transportation referred to by you is not coastwise, but outward, into foreign waters or to a foreign port. I am unable to perceive how the fact that passengers so transported are returned to the port of departure in the United States brings the case within the statute.

In the case of the *Cleveland*, *supra*, it was held that a tourist voyage around the world on a foreign steamship, the passengers embarking at New York and landing ultimately at San Francisco, was not within the act in question. It was said in that connection that the return of the passengers to the port in California was a mere incident of the object of the voyage, and, so far as the nature of the commerce was concerned, "precisely the same as if, after a voyage to Japan, they had been returned over the same route and relanded in New York"—the very case now pre-

322 *Authority to Send Militia into a Foreign Country.*

sented, and which was there considered as clearly not within the statute. In the case of the *Cleveland* the transportation came within the letter of the statute, since the tourists were actually transported from one port in the United States to another port therein, via a foreign port or ports. But that case was held not to be within the spirit of the statute, because the real object of the voyage was the trip around the world. In the present case the transportation referred to—from a domestic port to a foreign port or into foreign waters and return—is, in my judgment, neither within the letter nor the spirit of the law.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

AUTHORITY OF PRESIDENT TO SEND MILITIA INTO A  
FOREIGN COUNTRY.

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation.

DEPARTMENT OF JUSTICE,

*February 17, 1912.*

SIR: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:

“Whether or not, under existing laws, the President has authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?”

From very early times, in both England and this country, the militia has always been considered and treated as a military body quite distinct and different from the Regular or standing army, governed by different laws and

rules, and equally different as to the time, place, or occasion of its service. One of the most notable points of difference is this: While the latter was in the continued service of the Government and might be called into active service at all times and in all places where armed force is required for any purpose, the militia could be called into the actual service of the Government only in the few special cases provided for by law. Their service has always been considered as of a rather domestic character, for the protection and defense of their own country, and the enforcement of its laws.

This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom.

Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body, with the same limitations of the occasion and nature of their service. If they had intended to enlarge this they would have said so, just as they have when they intended to further limit or restrict the occasion or nature of their service.

When the Constitution gives to Congress the power "to raise and support armies," and to provide "for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and makes the President "the Commander in Chief of the Army and Navy of the United States, and the militia of the several States when called into the actual service of the United States," it is speaking of two different bodies—the one the Regular Army, in the continuous service of the Government, and liable to be called into active service at any time, or in any place where armed force is required; and the other a body for domestic service, and liable to be called into the service of the Government only upon the particular occasions named in the Constitution. And acts of Congress relating to the Army and the militia must have the same construction.

It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrec-



tions, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

As “insurrection” is necessarily internal and domestic, within the territorial limits of the Nation, this portion of the sentence can afford no warrant for sending the militia to suppress it elsewhere. And even if an insurrection of our own citizens were set on foot and threateningly maintained in a foreign jurisdiction and upon our border, to send an armed force there to suppress it would be an act of war which the President can not rightfully do.

The term “to repel invasion” may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term “to repel invasion.”

Then, too, if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling an invasion.

But this is quite different from and affords no warrant for sending the militia into a foreign country in time of peace and when no invasion is made or threatened.

The only remaining occasion for calling out the militia is “to execute the laws of the Union.” But this certainly means to execute such laws where, and only where, they are in force and can be executed or enforced. The Constitution or laws of the United States have no extra-territorial force and can not be compulsorily executed beyond or outside of the territorial limits of the United States.

It is true that treaties made in pursuance of the Constitution are, equally with acts of Congress, the supreme law of the land; but their observance, outside of our own

jurisdiction, can not be enforced in the same way. The observance and performance, outside of our own jurisdiction, of treaty stipulations and obligations are left much to the honor, good faith, and comity of the other contracting party, reenforced, at times, by a regard for the consequences of a breach. We can not send either the Regular Army or the militia into a foreign country to execute such treaties or our laws. Such an invasion of a foreign country would be an act of war.

Outside of our own limits "the laws of the Union" are not executed by armed force, either regular or militia.

The Constitution had already given to Congress the unlimited power to declare war, at any time and for whatever cause it chose. It did not, in this provision, attempt the useless thing of giving to Congress an additional power to declare war, or to afford an additional ground for doing so.

What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsorily executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

Under our Constitution, as it has been uniformly construed from the first, the military is subordinate and subservient to the civil power, and it can be called upon to execute the laws of the Union only in aid of the civil power and where the civil power has jurisdiction of such enforcement. Even the Regular Army can be thus called upon only on such occasions; and, certainly, the militia can not be thus called upon at any other.

Then, as the civil power is without force in a foreign country, and as even the Regular Army can not be sent into another country to there execute the laws of the Union, it follows that the Constitution confers no power to send the militia into a foreign country for the purpose stated in the question here considered. On the contrary, by its specific enumeration of the only occasions for calling out the militia, it clearly forbids this.

### 326 *Authority to Send Militia into a Foreign Country.*

In all this I am not unmindful that nations sometimes do make hostile demonstrations and use armed force to compel the observance by another nation of its treaty obligations, and sometimes send armed forces into another country to protect the lives and rights of its own citizens there.

I shall briefly notice these in their application to our own country, its Constitution and laws. It will be observed, and as controlling and conclusive of the present question, that in case of a hostile demonstration against or a forcible attack upon another nation to enforce its treaty obligations, or to punish their infraction, there is no question involved of executing the laws of the invading nation, for such laws have no force or existence there. While the Constitution makes itself and the laws and treaties, in pursuance thereof, the supreme law of the land, it is only in our own land where such laws are supreme or of any force. As to the other contracting party, a treaty is a mere compact, depending for its observance upon the good faith, comity, or other moral considerations. The Constitution can not make itself or the treaties or laws made under it the supreme law of any other nation, or give to either any force or existence beyond our own borders. So that, when an armed force is used to compel the observance of treaty obligations, or to punish or obtain compensation for their violation, there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement, or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

Just so it is when, in troublous times, an army of occupation, large or small, is sent into a foreign country to protect the lives and the rights of our own citizens. Here, too, no law of the Union is being executed by such invasion, for no law of the Union exists or can be enforced there.

While it is the duty of every nation to afford proper protection to foreigners who are lawfully within its borders, yet this is not because of any law of the nation of

which such foreigners are subjects, for no such laws exist or have any force there. No one can say, in such a case, that we are executing or enforcing any law of the Union. We are but aiding or compelling the foreign Government to execute its own laws and to perform its own duty. As no law of the Union is being executed by such invasion, the militia can not be called out, under this provision, to take part in it. As no law of the Union can exist or be in force in any foreign country, the militia can not be called out to enforce any such law there.

The plain and certain meaning and effect of this constitutional provision is to confer upon Congress the power to call out the militia "to execute the laws of the Union" within our own borders where, and where only, they exist, have any force, or can be executed by any one. This confers no power to send the militia into a foreign country to execute our laws which have no existence or force there and can not be there executed.

If authority is needed for the conclusion here reached, the following may suffice:

In Ordronaux, Constitutional Legislation, page 501, it is said:

"The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and third, to repel invasions.

"These three occasions representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or of its Territories. \* \* \* In the history of this provision of the Constitution, there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government, was intended as a distinct limitation upon their employment.

"Being the ministers of the law to enforce its commands, they can only be summoned by the law-making power to act within the extent of its jurisdiction, and in the manner prescribed by the Constitution. They can not consequently, be used to invade the territory of a neighboring country, or to enforce any public rights abroad. \* \* \*

"The militia of the States restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

And Von Holtz, Constitutional Law, page 170, it is said, "the militia can not be taken out of the country."

In *Kneedler v. Lane* (45 Pa. St. 238, 276), Judge Strong, speaking for the court, said:

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties, or to protect the rights of the Government, or its citizens, in those cases in which protection must be sought beyond the territorial limits of the country."

And see *Houston v. Moore* (5 Wheat. 1), and *Martin v. Mott* (12 Wheat. 19, 27).

It is true that the act of January 21, 1903, as amended by the act of Mar. 27, 1908 (35 Stat. 400), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the

Union. Congress can not, by its own enactment, enlarge the power conferred upon it by the Constitution; and if this provision were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional. This provision applies only to cases where, under the Constitution, said militia may be used outside of our own borders, and was, doubtless, inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian frontier.

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

PUBLIC PRINTER—ACCEPTANCE OF ESTIMATES FOR SUPPLIES SUBSEQUENT TO FINAL DATE FOR THE RECEIPT OF PROPOSALS.

Estimates furnished by the Public Printer, as provided for by section 2 of the act of March 3, 1883 (22 Stat. 527), for supplying the money-order service with forms and blank books, may be accepted which are submitted subsequent to the final date for the receipt of proposals from private bidders.

There is a clear distinction between proposals made by private bidders and estimates submitted by the Public Printer, and there is no statutory requirement that the latter shall be submitted before or at the time the former are made.

DEPARTMENT OF JUSTICE,

*February 19, 1912.*

SIR: I have the honor to acknowledge receipt of your letter of the 10th instant, with inclosures, in which my opinion is requested as to whether you can lawfully ac-

cept an estimate submitted by the Public Printer subsequent to the date advertised as the final day on which proposals would be received for supplying the money-order service with forms and blank books for the period beginning March 1, 1912, and ending November 30, 1915.

In your advertisement of December 18, 1911, requesting proposals for supplying the money-order service, you proceeded in accordance with the provision of section 2 of the act of March 3, 1883 (22 Stat. 527), the pertinent part of which enacts as follows:

"And all blanks, blank books, and printed or engraved matter supplied to postmasters by the Postmaster General or used in his department for the transaction of the money-order business shall be obtained from the lowest responsible bidders for furnishing printed and engraved matter, respectively, under separate advertisements calling for proposals to furnish the same for a period of four years, upon such conditions as the Postmaster General may prescribe: *Provided*, That the Public Printer and the Chief of the Bureau of Engraving and Printing of the Treasury Department shall submit, respectively, estimates of the cost of furnishing such printed and engraved matter as may be required for use in the money-order business, and they shall furnish such printed and engraved matter whenever upon their estimates of cost the expenditure therefor will be less than upon proposals made as above provided for."

Your advertisement contained the following language: "All bids received in response to the advertisement of September 13, 1911, for supplying the money-order service with domestic, international, and reissued money-order forms and certain record books during a term of four years beginning December 1, 1911, having been rejected, sealed proposals for furnishing such supplies during a term beginning March 1, 1912, and ending November 30, 1915, will be received at the office of the purchasing agent for this department until 2 o'clock p. m. January 19, 1912. Specifications may be obtained upon application to the purchasing agent." Following this and immediately preceding the proposal form appears a warning couched in the following language:

“NOTE.—Proposals, and the required samples of the papers and books, to receive consideration, must reach the office of the purchasing agent, Post Office Department, not later than 2 o'clock p. m., January 19, 1912, and the department will not give consideration to any bids which are received at a later hour or date, whatever may be the cause of the delay.”

On January 19, 1912, the Public Printer submitted an estimate, as provided by the statute, in response to your advertisement, stating in his letter of transmittal that should the actual cost of the paper, which must be purchased by the Public Printer as the result of public advertising, be less than the quoted prices, or should the cost of producing the work in the Government Printing Office be less than the prices given in his estimate, the difference between the prices quoted and the actual cost would be rebated to the Post Office Department. On January 20, 1912, subsequent to the opening of bids, the Public Printer submitted a supplemental estimate, quoting an aggregate reduction of \$34,275 on his estimate of the previous day, because he received a lower quotation on paper, which he claimed reached him too late to form a basis for his original estimate. On February 2, 1912, the Public Printer submitted a second supplemental estimate, quoting an aggregate increase of \$7,841.40 over his estimate of January 20.

The Assistant Attorney General for the Post Office Department, to whom the matter was submitted, expressed the opinion that the estimate furnished by the Public Printer was not a “bid,” but an “estimate” required by law, and was not governed by the principles of law applicable to proposals of private bidders; and that it was, therefore, legally competent for the Postmaster General to accept the revised estimate of the Public Printer if, as provided by the statute, the prices given therein were lower than those contained in private bids. In this opinion I entirely concur.

The Government maintains at a large expense a Public Printing Office and a Bureau of Engraving and Printing. Generally speaking, its maintenance of these establish-



ments can only be justified by their use. But in order that the work may be done on the best terms for the public interest the statute authorizes the Postmaster General to call for proposals from private bidders and requires him to procure these supplies "from the lowest responsible bidders," unless the Public Printer and the Chief of the Bureau of Engraving and Printing, respectively, shall submit estimates of the cost of furnishing the same supplies for prices less than those proposed by the lowest "bidder," in which event the statute requires that the materials shall be furnished or the work done by those Government establishments. The statute draws a clear distinction between "proposals" to be made by private bidders and "estimates" of the cost of furnishing the printed and engraved matter to be submitted by the Government establishments. The proposal made by the lowest bidder is to be accepted unless the estimate of cost made by the head of the Government establishment shall be lower. The proposals are required to be made by responsible bidders pursuant to "separate advertisements calling for proposals to furnish the same" (i. e., the supplies described in the act) "for a period of four years, upon such conditions as the Postmaster General may prescribe." There is no requirement in the statute that the Government Printing Office and Bureau of Engraving and Printing shall make or submit their "estimates" of the cost of doing the work *before* or at the same time the proposals of outside bidders are made. Nor are those estimates to be regarded in the same light as bids or proposals from outsiders. The statute gives to the head of the Post Office Department, in the public interest, the advantage of securing a bid or proposal from private manufacturers and dealers, and then, if the Government offices can better that price, the work is to be done by them. In this manner the Government is assured of obtaining the supplies on the best possible terms.

I have, therefore, to answer your question whether or not the revised estimates of the Public Printer may be legally accepted in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

## POSTAL SAVINGS SYSTEM—PLEDGING OF LOANED SECURITIES.

It is immaterial, under the postal savings depositories act of June 25, 1910 (36 Stat. 814), from what source the bank obtains the securities furnished the board of trustees as collateral to postal savings deposits, provided the board takes them in pledge on a valuable consideration with no other notice than that they are being used in the exact manner authorized by the owners thereof; and hence a bank may be permitted to pledge with the board of trustees as collateral to postal savings funds bonds loaned to it for that purpose.

When such bonds are transferred to the board of trustees by the bank in consideration of the deposit with the bank of postal savings funds, the board acquires a good title thereto as pledgee, since said bonds are negotiable instruments and the board is a purchaser for value without notice of any flaw in the title thereto.

DEPARTMENT OF JUSTICE,

*February 27, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, referring to my opinion to you of the 3d November last, in which I held that the board of trustees of the postal savings depository offices established by the act of June 25, 1910 (36 Stat. 814), were authorized, under section 9 thereof, to take from State banks of Wisconsin as collateral to postal savings deposits, public bonds, or other securities supported by the taxing power owned, not by said banks but by individual directors or stockholders thereof, and entrusted by them to such banks for the purpose of being pledged as such collateral.

You now inquire whether it is essential that the bonds so pledged shall be owned by the directors or stockholders of the banks concerned, and whether a bank may not be permitted to pledge bonds loaned to it for the purpose by a correspondent or bond firm under an arrangement by which the bank would give to the concern furnishing the security a surety bond conditioned to cover any loss which might result from the pledge of the bonds as security for postal savings funds; and, further, whether under such an arrangement the board of trustees would be amply protected.

The law of Wisconsin to which reference is made in your letter is sections 2024-36, chapter 94, of the Supplement to

334 *Postal Savings System—Pledging of Loaned Securities.*

the Wisconsin Statutes of 1898, and the pertinent part thereof is as follows:

“No bank, banker, or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security; \* \* \*

There is evidently nothing in this provision which prohibits the State bank from pledging, as collateral to postal savings deposits, bonds loaned to it for that purpose, since such bonds do not become part of its “assets,” but are merely bailed to it for a limited purpose (*Bowers v. Evans*, 71 Wis. 133; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Boyle v. National Bank*, 125 Wis. 498; *Bank v. Gillespie*, 137 U. S. 411; Hart, *Law of Banking*, pp. 381–388). It is equally clear that the board of trustees, when such bonds are transferred to it by the State bank in consideration of the deposit with said bank of postal savings funds, acquires a good title thereto as pledgee, since such bonds or securities are negotiable instruments and the board is a purchaser for value without notice of any flaw in the title thereto (*Murray v. Lardner*, 2 Wall. 110). The deposit of postal savings funds in the bank furnishes the consideration, and the only notice the board has is that the bank is lawfully in possession of the bonds and authorized to use them for this very purpose. My former opinion that the bonds need not be the property of the bank necessarily involved the conclusion that the source from which the bank obtains them is immaterial, provided the board takes them in pledge on a valuable consideration with no other notice than that they are being used in the exact manner authorized by the owners of them.

Respectfully,

GEORGE W. WICKERSHAM.

THE POSTMASTER GENERAL.

POSTAL SAVINGS SYSTEM—SPECIAL IMPROVEMENT BONDS  
OF PORTLAND, OREG.

Certain special improvement bonds of the city of Portland, Oreg., which are not limited in their obligation to any special fund, are public bonds supported by the general taxing power of the city within the meaning of section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 816).

DEPARTMENT OF JUSTICE,

*March 2, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 12th ultimo requesting my opinion whether certain bonds of the city of Portland, Oreg., are "public bonds or other securities supported by the taxing power" within the meaning of section 9 of the act of June 25, 1910, chapter 386 (36 Stat. 816).

In his opinion, inclosed with your letter, the Treasurer of the United States states that the above words have been construed by the board of trustees, under the discretion given them by section 9 *supra*, to mean "an obligation of a legally constituted \* \* \* municipality, \* \* \* constituting a proper charge that may be paid out of taxes levied against all the property, both real and personal, that is contained within the limits of the place that issues the bonds without any restrictions or limitations." I assume this construction of section 9 *supra*, and, furthermore, since no objection to these bonds is suggested to me other than that, not being payable out of the general tax levy of the city of Portland, but only out of a special-assessment fund, they are not, therefore, the absolute obligations of that city. I confine myself in this opinion to the sole question, viz, whether these bonds are the absolute obligations of the city of Portland, in the sense that they are payable out of the general fund raised by the ordinary tax levies, and I do not undertake to pass on their validity in any other respect.

These bonds belong to the class known as "special improvement bonds," and the conditions under which they are binding generally on the municipality issuing them are thus

stated by the Supreme Court of Oregon in *Avery v. Job* (25 Ore. 512, 520):

“ \* \* \* As a general rule, when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference; and, although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the corporation for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund of the corporation.  
\* \* \* ”

And this view is reiterated in *Eaton v. Mimnaugh* (43 Ore. 465, 476).

This statement of the law is in accord with the weight of authority. (*United States v. County of Clark*, 96 U. S. 211; *United States v. Fort Scott*, 99 U. S. 152, 159, 160; *Bank v. City of Clinton*, 111 Fed. 439, 443; *Morrison v. Bernards*, 36 N. J. Law 219, 222; *Commonwealth v. Pittsburg*, 88 Pa. 66, 85, 86; *Dillon on Municipal Corporations*, ed. 1911, vol. 2, p. 1390.)

The bonds of the city of Portland to which you call my attention do most certainly (according to the copy submitted by you) purport to bind the municipality absolutely. They state that the city agrees to pay them, principal and interest, in gold coin of the United States; they are signed by the proper city authorities as such and are sealed with the seal of the city; and the faith and credit of the city are pledged to their payment. Nothing is said in them to the effect that they are payable only out of a special fund, unless the bare reference to the acts under authority of which they were issued can have that effect. But those acts (act of Feb. 22, 1893, Laws of Oregon, p. 171; act of Feb. 21, 1901, Laws of Oregon, p. 372; Lord's Oregon Laws, Vol. II, sec. 3248), commonly known as the Bancroft

Act, provide for bonds of this very character. Section 4 of the act provides that the city shall issue "*its* bonds" "and such bonds shall, by the terms thereof, mature in 10 years from the date thereof, and *be payable in gold coin of the United States*, and bear interest not to exceed 6 per cent per annum." They shall be "signed by the mayor \* \* \* or other executive head of such city," countersigned by the recording officer of such city and authenticated by its seal. They are redeemable (according to sec. 9) by such city. In no place in the act is it provided that they are payable only out of a special fund. The contrary is clearly implied. For one thing, assessments are not usually paid in gold coin; and, for another, interest runs on the bonds as soon as they are issued, while interest on the assessments runs only as they are actually levied from time to time during the 10-year period. (*Mall v. City of Portland*, 35 Ore. 89, 93, 96.) It is true that a special fund is provided for, and undoubtedly the expectation is that it will be sufficient to take care of the bonds, but that is a matter which concerns the city and its tax payers; it can not affect the bondholders. The same circumstance in the cases cited *supra* in this opinion did not prevent the courts from holding the bonds to be the obligations of the municipality generally and payable out of its general tax levy.

It is urged, however, that the bonds in question can not be the general obligations of the city of Portland, because (it is said) the Supreme Court of Oregon has decided in the cases of *Ladd v. Gambell* (35 Ore. 393) and *Stratton v. Oregon City* (Ibid, 409) that the provisions of the charters of Portland and Oregon City, the one limiting the indebtedness of the municipality in various ways, the other excluding the general liability of the city for the cost of street and sewer improvements, were not repealed by the Bancroft Act of 1893 *supra*. If not repealed (it is argued), it can only be because the bonds issued under the authority of the Bancroft Act are not the general obligations of the municipalities, and are therefore not within the scope of their charters. This, however, is wholly to misapprehend

the nature and effect of the two decisions referred to. In the State of Oregon there is no express constitutional limit on the indebtedness of towns and cities. It is merely provided that the acts of the legislature incorporating such towns and cities must restrict their power of contracting debts. (Constitution of Oregon, Art. XI, sec. 5.) This the legislature has uniformly done, and specifically in the various charters of the city of Portland. The Bancroft Act of 1893, *supra*, which was a general act applying to all cities having 2,500 inhabitants, expressly provided in section 8:

“No obligation incurred by any city in this State by virtue of this act shall be deemed or taken to be within or any part of the limitation by law as to indebtedness by such city.”

This extension of the debt limit of the towns and cities of Oregon was, of course, within the competency of the legislature. (*Amey v. Allegheny City*, 24 How. 364.) Subsequently, however, to the enactment of the Bancroft Act the legislature of Oregon passed, in 1895, a new charter for Oregon City; in 1898, one for Portland; and it was claimed in the two cases referred to, *supra*, not that the Bancroft Act repealed the charters, but that the charters repealed the Bancroft Act, because inconsistent therewith. In *Ladd v. Gambell* the inconsistency was claimed to lie in the fact that the Portland charter of 1898 contained very strict limitations on the debt-incurring power of the city. In *Stratton v. Oregon City* it appeared that the new charter expressly provided that the city should not be liable for any portion of the cost of street or sewer improvements, and that no moneys should be paid out of the general fund of the city on account of such improvements. The Supreme Court of Oregon held that the Bancroft Act was not repealed by either of the charters—in the Portland case, because the limitation on the debt-incurring power contained in the charter referred only to debts incurred under the provisions thereof and not to debts incurred under a general act like the Bancroft Act; in the Oregon City case, because the provision that the city should not be liable generally for such improvements referred only to

its liability to the contractors who did the work and not to its general liability to the bondholders under the Bancroft Act. These decisions seem to be distinct authorities that the liability of towns and cities on the bonds issued under authority of the Bancroft Act is general and as complete as any other indebtedness, since the reasoning of the court in those cases went throughout on the assumption that the Bancroft Act gave power to the cities to issue their general obligations and that this power was outside of and above the provisions on the same subjects in their charters. The Bancroft Act has now been expressly extended to the city of Portland by act of January 23, 1903. (Special Laws of 1903, p. 172.)

Some reference is made to the municipal code of February 21, 1893 (Laws of 1893, p. 132), which by section 36 provides:

“The common council shall not in any manner create any debt or liability, which shall singly or in the aggregate exceed the sum of \$2,500, without first obtaining authority from the legislative assembly of this State to contract a debt or liability in excess of said sum.”

But this “authority from the legislative assembly” was afterwards obtained by section 8 of the Bancroft Act, quoted *supra*. Manifestly section 8 of that act has no meaning unless the obligations incurred thereunder are general obligations of the city, for an obligation which was confined to a special assessment on abutting owners and did not bind the city beyond using due care in the collection of such assessment, would evidently not be within section 36 of the municipal code, *supra*, nor, indeed, within any other restriction by law upon the debt-incurring power of a municipality.

The reason of this legislation by the State of Oregon is easy to see. The city has a lien on the property abutting on the improvement to aid and secure it in the payment of the bonds. This lien is not supposed to exceed the increase in the value of the property by reason of the improvement, and the general tax assessment valuation is not supposed to be affected thereby. Whether economically sound or not, these views are sufficient cause for mak-



ing these bonds the general obligations of the city and yet removing from them the bar of legislative limitation upon the debt-incurring power.

In my opinion, therefore, these bonds of the city of Portland are not limited in their obligation to any special fund, but are "public bonds" supported by the general taxing power of the city.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

---

IMPORTATION OF VIRUSES, SERUMS, TOXINS AND  
ANALOGOUS PRODUCTS.

The importation or admission into the United States of viruses, serums, toxins and analogous products, that are prepared by and sold or given away by a foreign unlicensed establishment to individuals or institutions in the United States for their use and not for sale, barter, or exchange by such individuals or institutions, is not contrary to the provisions of the act of July 1, 1902 (32 Stat. 728), regulating the sale of viruses, serums, etc.

DEPARTMENT OF JUSTICE,

*March 7, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 23d ultimo, in which you call my attention to the act of July 1, 1902 (32 Stat. 728), regulating the sale of viruses, serums, toxins, and analogous products in the District of Columbia and interstate traffic in said articles, and also to an application of Dr. O. L. Mulot, of New York, for permission to import, for use in his own immediate practice and without any view of selling it or any part of it to anyone else, certain antituberculosis serum prepared in Paris by establishments not licensed under section 1 of the above act. In view of this application you request my opinion on the following question:

"Is the importation or admission into the United States of serums, viruses, etc., that are prepared by and sold or given away by a foreign unlicensed establishment to indi-

viduals or institutions in the United States for their use and not for sale, barter, or exchange by such individuals or institutions contrary to the provisions of the said act of July 1, 1902?"

The first section of the act provides as follows:

"That from and after six months after the promulgation of the regulations authorized by section four of this Act no person shall sell, barter, or exchange, or offer for sale, barter, or exchange in the District of Columbia, or send, carry, or bring for sale, barter, or exchange from any State, Territory, or the District of Columbia into any State, Territory, or the District of Columbia, or from any foreign country into the United States, or from the United States into any foreign country, any virus, therapeutic serum, toxin, antitoxin, or analogous product applicable to the prevention and cure of diseases of man, unless (a) such virus, serum, toxin, antitoxin, or product has been propagated and prepared at an establishment holding an unsuspended and unrevoked license, issued by the Secretary of the Treasury as hereinafter authorized, to propagate and prepare such virus, serum, toxin, antitoxin, or product for sale in the District of Columbia, or for sending, bringing, or carrying from place to place aforesaid; nor (b) unless each package of such virus, serum, toxin, antitoxin, or product is plainly marked with the proper name of the article contained therein, the name, address, and license number of the manufacturer, and the date beyond which the contents can not be expected beyond reasonable doubt to yield their specific results: *Provided*, That the suspension or revocation of any license shall not prevent the sale, barter, or exchange of any virus, serum, toxin, antitoxin, or product aforesaid which has been sold and delivered by the licentiate prior to such suspension or revocation, unless the owner or custodian of such virus, serum, toxin, antitoxin, or product aforesaid has been notified by the Secretary of the Treasury not to sell, barter, or exchange the same."

The third section empowers any officer, agent, or employee of the Treasury Department duly detailed by the

Secretary of the Treasury to inspect establishments where such viruses, etc., are prepared *for sale, barter, or exchange* in the District of Columbia, or to be sent, carried, or brought into the United States or any of the States. Section 4 creates a board empowered to issue regulations to govern the issue, suspension, and revocation of licenses for the maintenance of establishments for the preparation of viruses intended *for sale* in the District of Columbia or to be sent, carried, or brought *for sale* from any State into another State, or from a foreign country into the United States, and it is provided that all licenses issued for the maintenance of establishments in any foreign country for the preparation of any virus *for sale, barter, or exchange* in the United States, shall be issued on condition that the licentiates shall permit an inspection of their establishments.

Section 7 provides as follows:

“SEC. 7. That any person who shall violate, or aid or abet in violating, any of the provisions of this Act shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.”

It will be noticed that the prohibition of this statute is directed against persons who send, carry, or bring viruses, etc., into the United States or into a State for sale, barter, or exchange, and against such persons only. Section 1 specifically and in clear language provides this, and the same limitation is referred to again in the proviso to section 1, in section 3, and twice in section 4. As this is a penal statute, the natural meaning of the words defining the offense and the class of offenders can not be enlarged by construction because of any supposed underlying intent of the act or because, to limit the offense as the act itself has limited it, will lead to evasion of its provisions, or will exclude offenses which are within the evil the act was meant to remedy. The law applicable to such a situation was thus stated by Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95:

“ \* \* \* The intention of the legislature is to be collected from the words they employ. Where there is no

ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. \* \* \*

This rule has been rigidly adhered to by the Federal courts. (*Sturges v. Crowninshield*, 4 Wheat. 122, 202; *Lake County v. Rollins*, 130 U. S. 662, 670; *Bate Refrigerating Company v. Sulzberger*, 157 U. S. 1, 36, 37; *United States v. Goldenberg*, 168 U. S. 95, 102; *Yerke v. United States*, 173 U. S. 439, 442; *Hamilton v. Rathbone*, 175 U. S. 414, 419, 420; *United States v. Baltimore and Ohio Southwestern Railroad Company*, 222 U. S. 8; *United States v. Ninety-nine Diamonds et al.*, 139 Fed. 961, 964.) Its application to this case compels an acceptance of the language of the act as final and limits the application thereof to persons who bring virus, etc., into the United States or one of the States for sale, barter, or exchange. Nor am I able to perceive that this construction leads to any absurd, unjust, or unnatural result. Congress may easily have intended to draw the line between the sale of these articles, which would lead to their indiscriminate dissemination, and their use in scientific and experimental research.

I have the honor to advise you that, in my judgment, your question should receive a negative answer.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

## REISSUED ARTICLES OF SHIP'S EQUIPAGE CHARGEABLE TO ANNUAL APPROPRIATION FOR "EQUIPMENT OF VESSELS."

Under the acts of June 25, 1910, and March 4, 1911 (36 Stat. 792, 1279), creating the naval supply account, articles of equipage of ships, which in prior fiscal years had been purchased and paid for under the appropriation "Equipment of vessels" and which had been turned into store from ships going out of commission, should be again charged against the annual appropriation for "Equipment of vessels" when they are reissued to the vessels upon their going into commission.

Under said act of March 4, 1911, the Secretary of the Navy is authorized, whenever the interests of the Naval Establishment require it, to direct that "surveyed material taken from repairs made to ships or plant at navy yards and stations" and "stores turned in from ships" going out of commission should not be charged to the naval supply account, the word "materials" as used throughout the acts in question being intended to include articles forming part of a ship's equipage.

DEPARTMENT OF JUSTICE,  
*March 7, 1912.*

SIR: I beg to acknowledge the receipt of the letters of the Assistant Secretary of the 19th and 27th ultimo in regard to the interpretation of the provisions of law creating the naval supply account.

In his letter of the 27th ultimo it is said:

"The department is contemplating putting into commission within the next few weeks the following vessels: The battleships *Kearsage*, *Kentucky*, *Illinois*, and *Alabama*; the *Charleston*, a protected cruiser, and several other cruisers.

"It is desired to use in commissioning these vessels some of the nonconsumable supplies, such as ships' equipage which in prior fiscal years has been purchased and paid for from moneys appropriated by Congress under the appropriation 'Equipment of vessels.' The articles of equipage have been turned into store mainly on account of the placing out of commission of vessels which have been using such articles. In some instances, they are to be returned to the same vessel by which they were previously used.

"I have the honor to request your opinion as to whether under the provisions of the laws of June 25, 1910, and March 4, 1911, heretofore cited, these articles of equipage should be again charged against the appropriation 'Equipment of vessels' in 1912, when they are reissued to the vessels going into commission."

The deficiency appropriation act of June 25, 1910 (36 Stat. 774, 792), contained the following provisions:

"Naval supply account for the Naval Establishment: All stores on hand July first, nineteen hundred and ten, shall be charged to a naval supply account on the records of the Bureau of Supplies and Accounts, and all purchases of stock or expenditures for manufactured or repaired articles for stock at navy yards or stations, during the fiscal years nineteen hundred and eleven and nineteen hundred and twelve, shall be charged to this account and be paid for from 'General account of advances.'

"The amount so advanced during the fiscal years nineteen hundred and eleven and nineteen hundred and twelve shall be charged to the proper appropriations as these stores are consumed from stock, and when disbursements made for all other purposes are accomplished, the amount so charged shall be returned to 'General account of advances' by pay or counter warrants: *Provided, however,* That such material as provisions, clothing and small stores, medical stores, and such other materials as the Secretary of the Navy may designate, may be purchased by specific appropriations or transferred to specific appropriations before such materials are issued for use or consumption. The said charge, however, to any particular appropriation shall be limited to the amount appropriated therefor.

"Credit shall be made to appropriations during said fiscal years nineteen hundred and eleven and nineteen hundred and twelve for the value of surveyed material taken from repairs made to ships or plant at navy yards and stations, or for stores turned in from ships, and this credit shall not be used by the bureaus to increase the amount of that appropriation, but shall be a deduction from the operating expenses of the annual appropriation

concerned, subject to the same provision as stated in above paragraph."

The naval appropriation act of March 4, 1911 (36 Stat. 1265, 1279), provided:

"The permanent naval supply fund created by the act of March third, eighteen hundred and ninety-three, as modified by the acts of June tenth, eighteen hundred and ninety-six, and March third, eighteen hundred and ninety-seven, and further increased by the acts of January fifth, eighteen hundred and ninety-nine, and February fourteenth, nineteen hundred and two, is hereby abolished, and of the sum remaining on the books of the Treasury to the credit of the said fund after the adjustment of all liabilities, the Secretary of the Treasury is hereby authorized and directed to cause the sum of one million five hundred thousand dollars transferred to the credit of said fund from the general account of advances to be returned to general account of advances, and the remainder to be covered into the Treasury; and hereafter the naval supply account for the Naval Establishment, as created by the act of June twenty-fifth, nineteen hundred and ten, under the Bureau of Supplies and Accounts, shall govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of all stores for the Naval Establishment, excepting the materials named in that act and such other materials as the Secretary of the Navy may designate: *Provided*, That the amount expended under general account of advances for the purchase and manufacture of stores and materials for the Naval Establishment shall not exceed the amount available for such purposes."

The general account of advances was established by act of June 19, 1878 (20 Stat. 167), which provided:

"*Be it enacted, etc.*, That the Secretary of the Navy be, and he is hereby, authorized to issue his requisitions for advances to disbursing officers and agents of the Navy under a 'General account of advances,' not to exceed the total appropriation for the Navy, the amount so advanced to be exclusively used to pay current obligations upon

proper vouchers and that 'Pay of the Navy' shall hereafter be used only for its legitimate purpose, as provided by law.

"SEC. 2. That the amount so advanced be charged to the proper appropriations, and returned to 'General account of advances' by pay and counter warrant; the said charge, however, to particular appropriations, shall be limited to the amount appropriated to each.

"SEC. 3. That the Fourth Auditor shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the 'General account of advances.'"

Referring to the acts of June 25, 1910, and March 4, 1911, the Assistant Secretary, in his letter of February 19, states:

"1. Under the interpretation placed on these two provisions by the Bureau of Supplies and Accounts, all stores on hand on July 1, 1910, were covered into a naval supply account, and when issued for use were charged to the appropriations named in the requisition.

"2. Supplies purchased subsequent to the passage of this law were paid for from the 'General account of advances,' and turned over to the naval supply account, and when issued for use were charged to the proper appropriation requiring them.

"3. All supplies of whatever nature, both consumable and nonconsumable articles, turned in by ships going out of commission, or by ships having purchased new articles to replace the ones turned in, are charged to the naval supply account, and an 'operating credit' allowed to the proper appropriation, which credit is in effect merely a bookkeeping transaction, and does not increase the appropriation to which it is credited. When these articles are again issued, upon a requisition, the appropriation is again charged for them."

It will be observed that the act of June 25, 1910, does not contain any provision expressly requiring "all stores on hand July first, nineteen hundred and ten" (which



it directs to be charged to the naval supply account), to be charged against specific appropriations as reissued. Nor does it expressly require "surveyed material taken from repairs made to ships or plant at navy yards and stations" or "stores turned in from ships" to be so charged when reissued. The only provisions which that act contains with respect to charging an appropriation for stores issued are as to the amounts advanced for the purchase of stock or expenditures for manufactured or repaired articles for stock at navy yards or stations, and, in the proviso, that certain articles mentioned, and such others as the Secretary may designate, may be purchased by or transferred to specific appropriations before such materials are issued for use or consumption.

If, therefore, the stores on hand July 1, 1910, are to be required to be charged to specific appropriations as issued, it is because such purpose is to be inferred from the action of Congress in placing such stores in one account, rather than from anything it has said on the subject, although the provision authorizing the Secretary to transfer certain materials to specific appropriations before they are issued for use and consumption, and the fact that specific annual appropriations were to be credited with material and stores turned in, suggest the inference that all stores charged to the naval supply account should be debited to specific appropriations when issued, from whatever source such stores may have been derived.

The condition of the law down to the act of June 25, 1910, is set forth in my opinion of February 28, 1910 (28 Op. 634), in regard to the illegal increase of the naval supply fund. That fund had been established by the act of March 3, 1893 (27 Stat. 723), for the purchase of ordinary commercial supplies, and the amount thereof had been increased thereafter until it amounted legally to \$2,700,000; but, as will be seen from my opinion of February 28, 1910, this fund had been augmented by the addition of stores purchased from time to time out of specific appropriations, so that in 1909 its worth was given at nearly eleven millions of dollars and the stock on hand was valued at over thirteen millions. The condition result-

ing from my ruling that this increase of the naval supply fund was illegal seems to have led to the passage of the act of June 25, 1910.

I understand that there were many millions of dollars' worth of general stores on hand July 1, 1910, which, under the act of June 25, 1910, were to be charged to the naval supply account. Several millions of these, it is to be inferred, had been purchased out of the naval supply fund, the law creating which in terms required it to "be reimbursed from the proper naval appropriations whenever the supplies purchased under said fund are issued for use." The rest, amounting also to many millions, were apparently the accumulation of years of purchases out of specific appropriations. Some of them were also, in all probability, stores turned in from ships when going out of commission, such as referred to in the inquiry now presented. All of these stores apparently were required by the act of June 25, 1910, to be charged to the naval supply account. Did or did not Congress intend all or any of such stores to be charged again against specific appropriations when issued for use or consumption?

It is to be observed that the law, as it stood prior to the act of June 25, 1910, apparently did not require general stores on hand theretofore purchased out of specific appropriations to be recharged to such appropriations when issued for use or consumption, either to the bureaus under whose appropriation they were purchased or to another bureau. (See act of Mar. 2, 1889, 25 Stat. 817, 818, and act of June 30, 1890, as amended by the act of Mar. 2, 1891, 26 Stat. 807, referred to in my opinion of Feb. 28, 1910.) But, as stated, stores purchased out of the naval supply fund, as well as stores purchased out of general account of advances, were expressly required to be charged to specific appropriations.

It appears that your department (which presumably best knew what was intended by the act of June 25, 1910, as that act appears, from the papers transmitted to me, to have been drawn for you by some expert accountants in the language in which it was enacted) from the first interpreted the law as requiring all stores on hand July

1, 1910, to be charged against specific appropriations as issued, from whatever source they were derived; and it seems fair to assume from the facts hereafter mentioned that the act of March 4, 1911, abolishing the naval supply fund and making permanent the naval supply account, was passed by Congress in the light of the interpretation that had been placed upon the former act. Thus it appears from the published reports of the hearings before the House Committee on Naval Affairs (No. 13, pp. 452-453) that on January 16, 1911, you made the following statement as to the practice under the act of June 25, 1910, in your efforts to have the naval supply fund abolished and the naval supply account created made permanent:

"Secretary MEYER. The system is this: *All stores were put into one property account. Hereafter no stores go to any bureau or division until they are required, and when they require them they have to pay for them out of the appropriation.* Then whatever is left of an appropriation at the end of the year goes right into the Treasury.

"Mr. PADGETT. And you do not have any general stores after this?

"Secretary MEYER. No. All stores on the 1st of July were turned into one property account.

"Mr. PADGETT. But what I wanted to get at was this: Those unused stores on the 1st of July go into one property account?

"Secretary MEYER. And there they remain.

"Mr. PADGETT. Now, if they go into that, will not that general property account be increased from year to year?

"Secretary MEYER. No; it can not be now, because no money can be used from any appropriation until they actually need the stores, *and then they pay for them*; and by law now the appropriations in each bureau at the end of the year are turned into the Treasury; before, they used them to buy stores whether they needed them or not. I do not mean that as a reflection, but it had become a custom."

Later on, at the same hearing, you made the following statement (ib., p. 456):

“Secretary MEYER. I would like to say in conclusion regarding the naval supply account that in consequence of approved methods established on ships in commission it enables the Bureau of Supplies and Accounts more promptly and accurately than was possible before to inform the Navy Department and its bureaus of the amounts expended against the various appropriations for stores and for labor and for clerical rolls, etc.

“To conclude:

“‘It will be seen that by means of a complete system appropriate records of all the activities of the Naval Establishment so far as concerns property and money find accurate lodgment in the Bureau of Supplies and Accounts. Hence the data provided for the information of Congress will have a scope and authority not possible heretofore.’”

The statement quoted by you appears to be from an opinion rendered you by the Comptroller of the Treasury in regard to the effect of abolishing the naval supply fund.

Whatever doubt might otherwise exist as to the necessity, under the act of June 25, 1910, for charging against specific appropriations all stores drawn from the naval supply account, whether previously purchased and paid for out of specific appropriations or not, would seem to be removed by the fact that Congress, when it passed the act of March 4, 1911, abolishing the naval supply fund and making the naval supply account govern the charging, crediting, etc., of all stores for the Naval Establishment, with the specific exceptions named, did so presumably in the light of the practical construction of the former act as stated by you in the hearings before the House Committee on Naval Affairs. At any rate, I do not feel justified now in expressing a different opinion.

Some question is also made as to whether non-consumable supplies, such as the ships' equipage, to which the present inquiry refers, were properly included in the naval supply account. The argument in this connection is that it was only intended to include in that account supplies common to more than one bureau or service, and these, necessarily, would be consumable supplies, and by con-

sumable is meant stores that would be consumed with their use, such as paints, oils, and lumber.

Neither the history nor the language of the act of June 25, 1910, seems to sustain this view. It will be observed that the act of March 3, 1893 (27 Stat. 723), creating the naval supply fund—and which was superseded by the legislation establishing the naval supply account—provided for the purchase of “ordinary commercial supplies” for the naval service. At a hearing before the Senate Committee on Naval Affairs—which took place on April 25, 1910, shortly prior to the passage of the act of June 25, 1910, and subsequent to the rendition of my opinion of February 28, 1910, in regard to the illegal increase of the naval supply fund, and at which the whole subject of supplies for the Navy was under consideration—the following occurred (Hearings, Committee on Naval Affairs, United States Senate, No. 1, pp. 9–10):

“The CHAIRMAN. What do you define as commercial supplies?

“Paymaster General ROGERS. Paints, metals, textiles, lumber—everything of that kind, which is not made especially for the Navy. *There is also included in that calculation the equipage of ships—anchors, chains, boats, navigational instruments, and articles of that character.*”

The language of the act of June 25, 1910, also indicates that nonconsumable as well as consumable stores were referred to, as it mentions “manufactured or repaired articles for stock,” and, in the proviso thereof, authorizing the Secretary to transfer certain materials, it says “before such materials are issued for *use* or consumption.

The statement of the present Paymaster General before the House Committee on Naval Affairs, made December 12, 1910 (No. 5, pp. 160–161), shows that under the act of June 25, 1910, all stores of every description, consumable as well as nonconsumable, had been included in the general supply account, and at the hearing before the House Committee on Naval Affairs (No. 13, p. 454), January 16, 1911, above referred to, you made the following statement, speaking with reference to the advisability of making the naval supply account permanent:

"Secretary MEYER. With one property account we do not have to, but before, where you had seven property accounts, you are quite right, and you had not a clearing house. Now the naval property account acts as a clearing house. *They carry all the supplies of every kind and description.* I am not saying that the naval supply account was not necessary before, but having one property account we do not need the naval supply fund.

"I want to say that with this one naval supply account a close watch can be kept of the stock, with a view of reducing the amount of stock to be kept on hand as well, and with the system we have adopted on the ships we have but one stores account. But we have to know in the future whether we are going to have one property account permanently or not, because we can not run it in the air."

The act of March 4, 1911, provides that the naval supply account as created by the act of June 25, 1910, shall "govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of *all* stores for the Naval Establishment, excepting the materials named in that act and such other materials as the Secretary of the Navy may designate. It is true the latter act does not contain the word "use," but, as it was manifestly dealing with the naval supply account as established by the act of June 25, 1910, I do not attach any special significance to this omission.

The purpose of the regulation in question seems to have been to establish a complete, simple, and economical system for the purchase, manufacture, repair, transfer, issue, use and consumption of *all* stores for the Naval Establishment, with the exceptions named or authorized, by which a proper and accurate cost account could be kept in respect to the several specific appropriations for such supplies.

Specifically answering your question, therefore, I have the honor to advise you that the articles of equipage to which you refer should be again charged against the appropriation "Equipment of vessels" in 1912, when they are reissued to the vessels mentioned upon their going into commission.

I have also been asked informally by the Assistant Secretary whether it is within your power to exempt from the operation of the naval supply account articles of ships' equipage turned into store upon vessels going out of commission.

The act of June 25, 1910, provided "that such material as provisions, clothing and small stores, medical stores, and such other materials as the Secretary of the Navy may designate, may be purchased by specific appropriations or transferred to specific appropriations before such materials are issued for use or consumption." This provision merely authorized the materials named and such others as you might designate to be purchased by or transferred to specific appropriations before they were issued for use or consumption. If so purchased or transferred, such articles would not, I understand, under the practical construction given the act by your department, be charged to the naval supply account if later they were turned in by ships. But there was no authority in this provision of the act of June 25, 1910, to except articles which had been drawn from the general supply account from the operation of the succeeding provision of that statute requiring credit to be given to annual appropriations for material taken from repairs made to ships and for stores turned in from ships. When such articles or materials are turned into store, they are required to be charged to the naval supply account, and hence would have to be charged again to specific annual appropriations when reissued.

But the exceptive clause in the act of March 4, 1911, is different, and due effect, it seems to me, must be given to the change in language. That act provides that the naval supply account, as created by the act of June 25, 1910, "shall govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of all supplies for the Naval Establishment, *excepting the materials named in that act and such other materials as you may designate.*" While this provision is not to be taken as authority to withdraw from the naval supply account, without charge against the specific annual appropriations concerned, articles which have previously been

charged to that account in accordance with law, it seems to me to be clearly intended to enable you to keep out of that account any article that you may designate. Hence, it would be within your authority, as to the future, if you thought the interests of the Naval Establishment required it, to direct that certain "surveyed materials taken from repairs made to ships or plant at navy yards and stations" or certain "stores turned in from ships" upon going out of commission, should not be charged to the naval supply account, the word "materials" as used throughout both acts evidently being intended to include articles forming part of a ship's equipage.

Respectfully,

WILLIAM R. HARR,  
*Assistant Attorney General.*

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

MEAT INSPECTION—POST-MORTEM EXAMINATION—MARK  
OF INSPECTION.

Under the meat inspection amendment of June 30, 1906 (34 Stat. 674), the Federal mark of inspection can not be lawfully placed upon any meat-food product unless the animal from which it was derived received a post-mortem examination by the inspectors of the Bureau of Animal Industry.

Imported meats and meat-food products are entitled to admission into this country and to interstate commerce subject only to the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768), even though they should be further manufactured in this country, provided they are not mixed with domestic meat and meat products, but they can in no instance bear the Federal mark of approval provided for by the meat inspection act of 1906. The opinion of August 25, 1911 (29 Op. 227), modified.

DEPARTMENT OF JUSTICE,  
*March 11, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 22d of November last, inclosing a letter to you



from Dr. Melvin, Chief of the Bureau of Animal Industry, and asking to be advised whether—

“Under the meat-inspection amendment the inspectors of the Bureau of Animal Industry are in any case authorized to place the mark of inspection upon a meat-food product which is derived from the carcass of any one of the four animals covered by the act, *if the carcass of that animal did not receive a post-mortem inspection by an inspector of the Bureau of Animal Industry.*”

In Dr. Melvin's letter it is stated that by a post-mortem inspection meat-inspection authorities understand an inspection, not only of the carcass, but of the head and organs while attached thereto (with which meaning the term will be hereinafter used); and that it is a fact of universal recognition by such authorities, both in this country and abroad, that it is impossible for a qualified inspector from an examination of the meat or other product only, and without such post-mortem inspection, to be certain whether the animal was affected with a disease which might render such meat or products unsound, unhealthful, unwholesome, and unfit for human food.

The answer to your question depends upon the construction to be given the meat-inspection amendment of June 30, 1906 (34 Stats. 674), in determining which a brief review of the earlier legislation upon the subject will be helpful.

The Bureau of Animal Industry, by which the meat-inspection laws are enforced, was created by the act of May 29, 1884 (23 Stat. 31), entitled “An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals.” This act was confined to domestic animals, and authorized the Secretary of the Treasury to take the necessary steps to prevent the exportation of diseased live stock, and prohibited interstate commerce therein. It made no mention of the carcasses and products of such diseased animals.

The act of August 30, 1890 (26 Stat. 414), provides that the Secretary of Agriculture may cause to be made a careful inspection of salted pork and bacon intended for ex-

portation, with a view of determining whether the same is wholesome, sound, and fit for human food. Such inspection was to be made only when required by the laws of the country to which the meat was to be exported, or when requested by the seller or buyer thereof, and might be made at the place of packing or of exportation.

The act of March 3, 1891 (26 Stat. 1089), entitled "An act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subject of interstate commerce, and for other purposes," provides in section 1 for an inspection of all live cattle exported to foreign countries; and in section 2 for an inspection of all live cattle, the meat of which is intended for exportation to any foreign country, with a view to ascertain whether such cattle are free from disease and their meat sound and wholesome.

Section 3 requires an ante-mortem inspection of all cattle, sheep, and hogs the carcasses or products of which are to go into interstate commerce, and authorizes "in all cases where the Secretary of Agriculture may deem necessary or expedient, under rules and regulations to be by him prescribed," a post-mortem examination of the carcasses of such animals.

Section 4 provides that after said examination, the carcasses and products of all animals "found to be free of disease, and wholesome, sound, and fit for human food, shall be marked as provided by the rules"; and section 5 prohibits the introduction into interstate commerce of the carcasses of animals found to be unsound or diseased.

Section 7 provides that the act should not apply to animals slaughtered by a farmer upon his farm, unless such carcasses should go into a packing establishment and be intended for transportation in interstate commerce.

The regulations made pursuant to this statute provided for a post-mortem examination of all animals slaughtered at any establishment where official inspection was maintained. Dr. Melvin states that from that time forth, as well before as after the act of 1906, the Federal mark of approval was placed only upon the meat of animals thus examined.

In this state of the law was passed the act of June 30, 1906, the purpose of which is stated to be—

“Preventing the use in interstate or foreign commerce,  
\* \* \* of meat and meat-food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food.”

The first paragraph of this amendment authorizes, in the discretion of the Secretary of Agriculture, an ante-mortem examination and inspection of all cattle, sheep, swine, and goats before entering for slaughter any establishment the meat and meat-food products whereof are to be used in interstate or foreign commerce, and that when so slaughtered the carcasses shall be subject to a careful inspection.

Paragraph 2 commands the Secretary to cause to be made, for the same purposes, a post-mortem examination and inspection of the carcasses and parts thereof of all such cattle, sheep, swine, and goats to be prepared for human consumption, and provides that the carcasses and parts of all such animals “found to be sound, healthful, wholesome, and fit for human food” shall be marked “Inspected and passed”; while those found to be unsound are to be labeled “Inspected and condemned,” and are to be destroyed for food purposes; and that the inspectors may, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether, since the first inspection, the same have become unfit for human food, and if so the same shall be destroyed for food purposes.

It will be recalled that under the prior act ante-mortem examination had been compulsory and post-mortem examination discretionary. By the act of 1906 ante-mortem examination is made discretionary and post-mortem examination compulsory. Congress thus approved the departmental practice and required its continuance.

The third paragraph of the act, which is essential to the present inquiry, provides that the foregoing provisions shall apply to all carcasses, meat and meat products of the four animals mentioned, which may be brought into any slaughtering, meat-canning, packing, rendering, or similar establishment; and such examination is to be made before the carcass shall be permitted to enter another department of the establishment to be prepared for meat-food products,

or before it shall enter another similar establishment or reenter the same establishment after once leaving it.

Paragraph 4 directs an inspection, for the purposes before set forth, of all meat food products prepared for interstate or foreign commerce, all those found to be sound, healthful, and wholesome and free from harmful preservatives to be labeled "Inspected and passed," and all others to be condemned and destroyed for food purposes.

Paragraph 5 provides that when any meat or meat food product prepared for interstate or foreign commerce, which has been inspected as hereinbefore provided and marked "Inspected and passed," shall be packed in any receptacle or covering, a label bearing the same legend shall be placed on such covering or receptacle, and the inspection is not to be considered complete until the sealing of said receptacle.

The eighth paragraph forbids after October 1, 1906, the transportation in foreign or interstate commerce of any meat or meat food products which have not been inspected, examined, and marked as "Inspected and passed" in accordance with the act and the rules to be made thereunder.

Paragraph 17 forbids any person engaged in interstate commerce in meat or meat food products, from transporting or selling any such products in any State other than that where manufactured, unless and until such person shall have complied with all the provisions of the act; while the next paragraph makes any violation of the act a misdemeanor and prescribes the penalty therefor.

Paragraph 19 provides that the Secretary of Agriculture shall make rules for the efficient execution of the act; shall appoint inspectors to make the examinations required, and that the inspectors shall refuse to stamp any meat or product "until the same shall have actually been inspected, and found to be sound, healthful, wholesome, and fit for human food."

Paragraph 21 excepts from the act animals slaughtered by any farmer on the farm, and by retail butchers and dealers supplying their customers, with a proviso that the Secretary in his discretion may establish inspection in such establishments, in which event the provisions of the act shall apply to them.

The regulations adopted pursuant to this statute by the bureau, provide for an ante-mortem examination of all animals except those slaughtered on the farm; for a post-mortem examination of the animal and all its organs; for an inspection of each piece as the carcass is dissected; for a reinspection of the carcass or piece as it leaves the establishment or enters another department or another official establishment; and, in case of the canned product, for a further inspection at each stage of its manufacture until the receptacle is finally sealed; and, finally, in the case of fresh meat there is even provided in some instances a retail market inspection. In short, the regulations provide for an examination of the meat or meat product, in every conceivable shape, from the time the animal enters the slaughtering establishment until the product is in the hands of the retailer.

With respect to animals killed on the farm the regulations provide that the carcass may enter an official establishment only when the head and viscera are held in place by natural attachments. (Regulation 20.) The post-mortem examination may thereupon be made for the purpose of determining whether the animal is diseased.

From this review of the legislation and regulations it appears that since 1891 the Federal mark of inspection and approval has been placed on meat and meat food products only when the inspectors ascertained from actual inspection after death, and in some cases before death also, that the animal was free from disease at the time of its death and that the meat or product was sound, healthful, wholesome, and fit for human consumption; that during this entire period a post-mortem examination was maintained, at first in the discretion of the Secretary of Agriculture, and after 1906 by the express command of the statute.

There is, therefore, a long-continued departmental construction that the mark of inspection may not lawfully be placed upon any meat or meat-food product unless the animal from which it was derived received a post-mortem examination at the hands of your inspectors.

In *United States v. Finnell*, 185 U. S. 236, the court held that the construction given during many years to an act by

the department charged with its execution was entitled to great weight, and unless clearly wrong should not be overruled except for cogent reasons.

On September 27, 1906 (26 Op. 50), Attorney General Moody advised you that imported meats and meat-food products were not covered by the meat-inspection amendment, but that they were entitled to admission into this country, and to move freely in our interstate commerce, provided only that they meet the requirements of the food and drugs act, which was approved on the same day as the meat-inspection amendment. Section 11 of the former act specifically authorizes you to examine samples of food offered for admission into this country, and enacts that food which is adulterated, misbranded, or otherwise dangerous to the health of our people shall be denied admission.

You now state that it is impossible on such examination to affirmatively find that such imported meat or product is fit for human consumption, because of the inability to make a post-mortem examination of the animal from which it is taken. I presume it was for this reason that in Food Inspection Decisions 74 and 116 you and the Secretary of the Treasury and the Secretary of Commerce and Labor ruled that the meat and products of cattle, sheep, swine, and goats (the four animals mentioned in the meat-inspection amendment) should not be received into this country unless there was produced a certificate from an official inspector of the foreign country from which imported that the animals were inspected before and after slaughter, and were found to be in a healthy condition.

When such meat and products are received into this country and used in the manufacture here of meat-food products, the query naturally presents itself whether you are authorized to accept such foreign certificates at their face value, and to place the Federal mark of inspection on such final products.

This question arose in connection with lard substitute, a meat product composed of 20 per cent oleo stearin and 80 per cent cottonseed oil. You asked my opinion whether such product was subject to inspection, and whether you

were empowered to determine by regulation if such lard substitute was a meat-food product. Acting Attorney General Fowler on July 22, 1910 (28 Op. 369), answered the second question in the affirmative, and sustained as valid section 8 of regulation 3, defining a meat-food product to be one a considerable and definite portion of which was derived from any edible portion of the carcass of any of the animals mentioned in the act. It was stated by you at that time that lard substitute had been inspected by you from the time the statute of 1906 took effect, but only where the product was made from *domestic* oleo stearin.

Following this decision, and on August 14 last, you asked me whether in my opinion the meat-inspection act prohibited the transportation of lard substitute in interstate commerce when it is made in this country by the use of *imported* oleo stearin.

On August 25, while stating that the act was susceptible of another construction, yet, upon the information then before me, and for the purpose of broadening your powers of inspection as much as possible, I advised you that any meat-food product manufactured in this country was subject to inspection under said act irrespective of the place whence its constituents came, and therefore I answered your question by stating that in my opinion the establishments in which such product was manufactured were subject to your inspection and that the lard substitute there manufactured, whether with domestic or imported oleo stearin, could not be transported in interstate commerce unless inspected and passed in conformity with the act.

You did not at that time advise me of the uniform construction above mentioned which your department had put upon the statute of 1906, nor of the food now stated by you that "it is impossible, from an examination of the meat or meat-food products alone, to determine in all cases whether or not the carcass of the animal from which the meat came was so diseased as to render the meat or meat-food product unfit for food or even positively injurious to health."

These facts now presented to me for the first time introduce new elements into the problem which compel me to a

different conclusion from that embodied in my opinion of August 25, 1911.

The act of 1906 requires as a condition to the placing of the stamp "inspected and passed" that the inspectors should by examination and inspection have found all such products to be sound. If as a matter of fact—and upon this point I am concluded by your determination—such soundness can not be ascertained and found except by the inspection provided for in paragraphs 2 and 3 of the act, it must be that Congress did not intend the provisions of the act to apply to cases where such inspection is impossible. The proper construction therefore is to read paragraph 4 in connection with the other portions of the act and to restrict its application to the cases where inspection can be had in conformity with the requirements of the statute, and this necessarily leads me to the conclusion that your question must be answered in the negative.

This construction also leads to a modification of the conclusion stated in my opinion of August 25, 1911, that the product when made with imported oleo stearin is not entitled to be transported in interstate commerce unless inspected, passed, and stamped pursuant to the act of 1906. For imported meats and meat food products are entitled to admission into this country and to interstate commerce subject only to the provisions of the food and drugs act. And in my opinion this continues true of them, even though they should be further manufactured in this country, provided they are not mixed with *domestic* meat or meat products.

In other words, the Federal mark of inspection may lawfully be placed only upon products of those animals which have been constantly under the examination of your inspectors "from the hoof to the can." Congress has not prohibited interstate commerce in such foreign products, even though partly manufactured here, but they can in no instance bear the Federal mark of approval provided for by the meat-inspection act of 1906.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF AGRICULTURE.



## CLEARANCE OF VESSELS—IMPORTATION OF OPIUM NOT INCLUDED IN MANIFEST.

A collector of customs has no right to refuse clearance of a vessel, used as a common carrier, because of the non-payment of a fine imposed under section 2809 of the Revised Statutes, for bringing into the United States merchandise not included in the manifest, unless the master or owner of the vessel was consenting to the illegal act or privy thereto.

Where the vessel is not used as a common carrier, the Government has, by virtue of section 3088 of the Revised Statutes, a lien on the vessel for the penalty thus incurred by the master, and may enforce that lien by libel and seizure; but where the vessel is used as a common carrier, and the owner or master thereof is not a consenting party to the illegal act, or privy thereto, the only remedy appears to be an action against the master.

DEPARTMENT OF JUSTICE,  
*March 12, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you state that the collector of customs at San Francisco has imposed fines on the masters of several vessels of the Pacific Mail Steamship Co. for violation of section 2809 of the Revised Statutes, for the reason that smoking opium was found concealed on board the vessels on their arrival at San Francisco, which opium was not mentioned or described on the manifest of the importing vessels. It is stated further that, in practically all the cases, the evidence shows that the masters had no knowledge of the presence of the opium on board the vessels, but that the collector acting under authority of article 1251 of the Customs Regulations of 1908, has, in one instance, refused clearance of the vessel. In view of this state of facts you request my opinion as to whether a collector of customs may refuse clearance to a vessel when the master and owners thereof refuse to pay a fine imposed for violation of section 2809 of the Revised Statutes, when it has been ascertained that the master or owners of the vessel were not at the time of the commission of the illegal act consenting parties or privy thereto.

Section 2809, which is part of Title 34 of the Revised Statutes, provides as follows:

“SEC. 2809. If any merchandise is brought into the United States in any vessel whatever from any foreign port

without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel shall be forfeited."

Section 3088, which is also a part of Title 34 of the Revised Statutes, provides:

"SEC. 3088. Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty."

But, by the act of February 8, 1881 (21 Stat. 322), it was provided:

"That no vessel used by any person or corporation, as common carriers, in the transaction of their business as such common carriers, shall be subject to seizure or forfeiture by force of the provisions of title thirty-four of the Revised Statutes of the United States unless it shall appear that the owner or master of such vessel, at the time of the alleged illegal act, was a consenting party or privy thereto."

It is clear that, prior to the passage of the act of February 8, 1881, *supra*, for any violation of section 2809, by which the master became liable to a penalty, the United States acquired a lien on the vessel itself which it could enforce by libel and seizure (*The Queen*, 4 Ben. 237; *The Missouri*, 3 Ben. 508, affirmed 9 Blatch. 433); but it is equally well established that, since the passage of that act, no such lien arises and no such seizure can be made in the case of common carriers, unless the owner or master was consenting to the illegal act or privy thereto. (*The Saratoga*, 9 Fed. 322, affirmed 15 Fed. 382; *The Snow Drop*, 30 Fed. 79; *The Walla Walla*, 44 Fed. 796.) If no lien arises in favor of the United States, if the vessel be not "holden for" the payment of the penalty where there is no such consent or privy, it would seem necessarily to follow that

clearance could not be refused. It is provided by section 4197, Revised Statutes, that, on delivery of a sworn manifest to the collector by the master, the former "shall grant a clearance for such vessel and her cargo." The only other general conditions precedent to the grant of clearance which I can find are a manifest from the owners, shippers, or consignors (R. S. sec. 4200), compliance with the State inspection laws (R. S. 4202), and payment of all accrued fees (R. S. 4206). *Expressio unius est exclusio alterius*. It must be taken that Congress did not intend clearance to depend on the opinion of the collector as to whether the revenue laws had been violated or not, especially in a case where it is expressly provided that the vessel shall not be liable for the penalty claimed by the collector. The opinion of Attorney General MacVeagh of April 28, 1881 (17 Op. 82), affirming the right of the collector to refuse clearance when the master of the vessel was liable to a penalty under Revised Statutes 2809, was based on the assumption that the Government had a lien on the vessel in such a case, an assumption which the above decisions show is not founded in law.

Where the vessel in question is not used by any person or corporation as a common carrier, a lien would exist in favor of the Government by virtue of section 3088, Revised Statutes, *supra*, and Attorney General MacVeagh's opinion would apply. In that opinion Mr. MacVeagh, to support his opinion that a collector may refuse clearance when he knows the Government has a lien on the vessel, relies solely on *Bas v. Steele* (3 Wash. C. C. 381, s. c. Peters C. C. 406). It is doubtful, on a reading of the whole case, whether the language of Mr. Justice Washington in that decision quoted and relied on by Mr. MacVeagh did not have application solely to a case where a Federal statute authorized the collector to refuse clearance under given circumstances. However that may be, it appears to be well settled that section 4197, Revised Statutes, *supra*, requires the collector to grant clearance, unless he has some distinct statutory authority for refusing. (*Otis v. Bacon*, 7 Cranch 589; *Gilchrist v. The Collector*, 1 Hall Law J.

429; *United States v. Burke*, 99 Fed. 895; *Hendricks v. Gonzalez*, 67 Fed. 351, 353.) In the latter case the Circuit Court of Appeals for the second circuit said:

"\* \* \* The plaintiff having complied with the conditions entitling him to clearance by the law of Congress (Rev. St. sec. 4197), it was the duty of the defendant, as collector of the port, to grant a clearance for the vessel and her cargo, unless he was justified in refusing to do so by some other statutory authority. Neither the Secretary of the Treasury nor the President could nullify the statute and, though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized by law. \* \* \*"

This statement of the law is reenforced by the fact that Congress has specifically provided for refusing clearance in cases where it thought such a course proper. For example, the act of March 22, 1794 (1 Stat. 349, ch. 11, sec. 3), (persons suspected of engaging in the slave trade); act of July 6, 1812 (2 Stat. 778, ch. 129, sec. 1), (vessels trading with the enemy); act of April 20, 1818 (3 Stat. 450, ch. 88, sec. 11, Rev. Stat. 5290), (violation of neutrality laws); act of May 20, 1862 (12 Stat. 404, ch. 81, sec. 1, Rev. Stat. 5320), (vessels suspected of voyage to insurgent ports); act of March 3, 1903 (32 Stat. 1215, sec. 9), (nonpayment of fine for bringing in diseased immigrants).

I am, therefore, of the opinion that a collector of customs has no right to refuse clearance to a vessel because of nonpayment of a fine imposed for violation of Revised Statutes 2809.

You further request me to advise you whether there is any remedy which the Government has for the collection of the said fine other than a suit against the master of the vessel. Where the vessel is not used by any person or corporation as common carriers in the transaction of their business as such common carriers, the Government has, by virtue of Revised Statutes 3088, a lien on the vessel for the penalty incurred by the master, and may enforce that lien

368 *Postal Savings System—Organization of Banks.*

by libel and seizure. (*The Queen, supra; The Missouri, supra.*) Where, however, the vessel is so used by common carriers, and the owner or master thereof is not a consenting party to the illegal act or privy thereto, the only remedy appears to be an action against the master.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

---

POSTAL SAVINGS SYSTEM—ORGANIZATION OF BANKS.

A bank is "organized under National or State laws" within the meaning of section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 816), when it is incorporated, or clothed with the essential attributes of a corporation by virtue of legislative sanction.

The mere authority to transact a banking business, although granted in pursuance of State laws, carries with it no implication of organization under the State laws, irrespective of whether such authority is or is not exercised subject to State supervision and examination.

DEPARTMENT OF JUSTICE,

*March 12, 1912.*

SIR: I am in receipt of your communication of the 5th instant wherein you present a question for my consideration, as follows:

"Section 9 of the postal savings act of June 25, 1910 (36 Stat. 816), provides in part as follows:

"That postal savings funds received under the provisions of this act shall be deposited in solvent banks, whether organized under National or State laws, being subject to National or State supervision and examination."

"Under the laws of several States private banking firms are required to obtain authority from the State banking commissioner to engage in business and are made subject to State supervision and examination. Applications to qualify for deposits of postal savings funds have been received from numerous institutions of this character. As an illustrative case I inclose correspondence in regard to the application of Messrs. John Steneck & Sons of Ho-

boken, N. J., together with the State laws on the subject, and beg to request your opinion whether that firm may be regarded as 'organized under \* \* \* State laws' within the meaning of the act of June 25, 1910."

By the act of the General Assembly of New Jersey, approved March 28, 1895 (chap. 368, Session Laws of 1895), it was provided that individuals, associations of individuals, partnerships, or joint-stock associations, should not thereafter engage in the business of banking unless authorized so to do by the commissioner of banking and insurance by his official certificate to that effect, which should issue only after preliminary examination showing the applicant to be solvent and possessed of unincumbered assets of at least \$20,000 in excess of outstanding liabilities, and that such individuals, associations of individuals, partnerships, or joint-stock associations engaged in the business of banking should thereafter be subject to the same control, supervision, inspection, and examination to which incorporated banks were then subject.

By the act of the general assembly, approved April 25, 1907 (chap. 106, Session Laws of 1907), it was provided that no person or corporation should thereafter engage in the business of transmitting money to foreign countries, or buying or selling foreign money or receiving money on deposit to be transmitted to foreign countries, without a certificate of authority to transact such business granted by the commissioner of banking and insurance, and that before such certificate should issue the applicant should execute a bond to the commissioner in the sum of \$20,000, conditional upon the faithful performance of the obligations imposed by the act.

It appears that John Steneck & Sons, of Hoboken, N. J., is a firm or partnership of individuals, which has complied with these provisions, together with the other laws of the State relating to banks, and has been duly authorized to transact the business of banking in pursuance thereof. It is my judgment, however, that this does not satisfy the requirements of the act of June 25, 1910 (36 Stat. 814), *supra*.

370 *Postal Savings System—Organization of Banks.*

The mere authority to transact a banking business, although granted in pursuance of State laws, carries with it no implication of organization under the State laws, irrespective of whether such authority is or is not exercised subject to State supervision and examination.

In *Eliot v. Freeman* (220 U. S. 178, 186) the Supreme Court used the following language in construing the corporation-tax law:

“The language of the act ‘\* \* \* now or hereafter organized under the laws of the United States,’ etc., imports an organization deriving power from statutory enactment. The statute does not say under the law of the United States, or a State, or lawful in the United States or in any State, but is made applicable to such as are organized under the laws of the United States, etc. The description of the corporation or joint-stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations.”

The question before the court in that case was quite different from the question which is here presented for determination, but I think that it is the plain purport of the language quoted that organization, in its legal sense, must be taken to imply statutory organization. It follows that a bank “organized under National or State laws” within the meaning of the postal-savings act must be a bank which is the creature of statute law.

I am of the opinion that it is necessary that a bank should be incorporated, or clothed with the essential attributes of a corporation by virtue of legislative sanction, in order to come within the intention of the act. The applicant can not, therefore, properly qualify to receive postal savings funds.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

EIGHT-HOUR LAW—CONSTRUCTION OF NAVAL VESSELS.

The provision in the naval appropriation act of March 4, 1911 (36 Stat. 1287), requiring the person, firm, or corporation constructing any of the vessels therein specified to establish an eight-hour workday for all its employees, does not authorize the establishment of a schedule by which the employees work more than eight hours in any one day.

A schedule by which employees work  $8\frac{1}{2}$  or  $8\frac{3}{4}$  hours on five days in the week and 4 or 5 hours on Saturday, making a total of 48 hours in each week, is prohibited by the eight-hour workday restriction in said act of 1911.

DEPARTMENT OF JUSTICE,  
*March 19, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant, inclosing letters from the Fore River Shipbuilding Co. and the New York Shipbuilding Co., contractors with your department for the construction of certain battleships. From the correspondence it appears that these companies have been heretofore in the habit of working their employees 10 to  $10\frac{1}{2}$  hours per day on five days in the week and 5 hours on Saturday, thus permitting a half holiday on Saturday. They now desire, adhering to this same general plan, to work  $8\frac{1}{2}$  or  $8\frac{3}{4}$  hours on five days in the week and 4 or 5 hours on Saturday, making a total of 48 hours in each week, and allowing their employees the half holiday on Saturday as before. They state that their employees would be greatly dissatisfied, if, by reason of working only 8 hours in each calendar day, they lost their half holiday on Saturday. In view of these circumstances, you wish to be informed whether the establishment of such a working basis would meet the requirements of the act of March 4, 1911 (36 Stat. 1265, 1287), which prohibits payment for these battleships to any person or corporation which has not established for all its employees engaged in their construction "an eight-hour workday."

The general, broad policy of statutes restricting the hours of labor of employees, as pointed out in my opinion to you of December 21 (29 Op. 279), last, and in *Averill's Case* (14 Ct. Cls. 200, 207), is "that eight hours' labor is enough to be performed in any one day, and that the condi-



tion of laboring people would be greatly improved and elevated if their physical work were restricted to that extent, and they were afforded more time to devote to mental culture and improvement." The accomplishment of this large purpose should not be made to turn upon a doubtful construction of slightly varying phraseology, or upon the argument that these same ends can be as well, if not better, attained by other methods. Congress has passed several acts relating to this subject, and, though the terms used vary somewhat, the purpose of their enactment must, in the absence of any evidence to the contrary, be taken to be the same. The act of June 25, 1868 (15 Stat. 77), R. S. 3738, provided that "*eight hours shall constitute a day's work.*" The act of May 24, 1888 (25 Stat. 157), relating to letter carriers, used the same language and added "if any letter carrier is employed a greater number of hours *per day* than eight he shall be paid extra for the same." The act of March 30, 1888 (25 Stat. 57), provided "and the Public Printer is hereby directed to rigidly enforce the provisions of *the eight-hour law.*" The act of August 1, 1892 (27 Stat. 340), which was clearly passed merely to extend the act of 1868 to contractors and subcontractors and to provide a penalty for violations of its restrictions (House Report No. 267, 52d Cong., 1st sess., Senate Report No. 948, *ibid*, 20 Op. 459, 462), and not to change its general meaning, provided "that the service and employment of all laborers and mechanics \* \* \* is hereby limited and restricted to *eight hours in any one calendar day.*" The act of June 2, 1900 (31 Stat. 252, 257), provided "That letter carriers may be required to work as nearly as practicable only *eight hours on each working day, but not in any event exceeding forty-eight hours during the six working days of each week;* and such number of hours on Sunday, not exceeding eight, as may be required by the needs of the service; and if a legal holiday shall occur on any working day, the service performed on said day, if less than eight hours, shall be counted as eight hours without regard to the time actually employed." The act of June 17, 1902 (32 Stat. 389), relating to reclamation of arid lands, contained the proviso "that in all construction work *eight hours shall constitute a day's work.*" The naval appropriation act of June 24,

1910 (36 Stat. 605, 628), required the contracts for construction of vessels to contain a provision bringing them within the act of August 1, 1892, *supra*. The act which passed the House December 14 last and is now pending in the Senate is to the same effect, though of broader scope.

As indicated above, I do not think that the slightly varying phraseology of these acts indicates any different intention on the part of Congress as to the main purpose of the legislation, i. e., to limit the hours of labor to eight hours in one day. It can not be denied that the act of August 1, 1892, with its restriction to eight hours in any one *calendar* day would prohibit the schedule of hours desired by your correspondents, and, as pointed out above, Congress did not suppose that this language had any different meaning from the provision "that eight hours shall constitute a day's work" of the act of June 25, 1868. The naval appropriation act of June 24, 1910, expressly adopts the act of August 1, 1892, and I can not believe that the phrase "eight-hour workday" in the act of March 4, 1911, is so clearly different in meaning as to indicate that Congress intended to make this act, upon this important point, an exception to all other legislation on the same subject, especially since, as pointed out in my opinion of December 21 last (29 Op. 279, 284), the Members of Congress responsible for the amendment to the naval appropriation act and the conference report on the bill stated that it was intended thereby to apply the restrictions of the act of August 1, 1892, to the construction of vessels authorized in the appropriation act.

The act of May 24, 1888, *supra*, containing the provision "that hereafter eight hours shall constitute a day's work for letter carriers," came under the consideration of the Court of Claims in the *Letter Carriers' Cases* (27 Ct. Cls. 244). One of the contentions of the Government in those cases was that, where a carrier worked *less* than eight hours in a day he was to be charged with the deficiency, and that his extra pay was to be figured on an eight-hour average through a period of a week, month, or year. In disposing of this claim the court said (27 Ct. Cls. 259): "To sustain the interpretation given to the act by the Department, it will be necessary to read in it by construction

the words 'on an average'—i. e., if any letter carrier is employed on an average a greater number of hours per day than eight, he shall be paid extra for the same. This the court is not at liberty to do." This language of the Court of Claims is adopted as its opinion by the Supreme Court on appeal (*United States v. Gates*, 148 U. S. 134). The same principle seems to be involved in the decisions in *Luske v. Hotchkiss* (37 Conn. 219), *Brooks v. Cotton* (48 N. H. 50), *Helphenstine v. Hartig* (5 Ind. App. 172), and in Mr. Moody's opinion in 26 Op. 64, 67. The act of June 2, 1900, *supra*, passed to regulate the situation disclosed by the *Letter Carrier Cases*, shows that when Congress intends to permit an *average* eight-hour day to be computed by the week, or some longer period, it is capable of using language clearly expressing that idea.

To construe the phrase "an eight-hour workday" so as to make it, not a standard in and of itself, but merely a factor in some larger period of time, would be to enter on an unknown course without guide or compass. Why should a week be taken as the ultimate sum? Why not a month or a year? A schedule could then be arranged of, say, 192 hours a month, consisting of, say, 12 hours a day with holidays interspersed. Or the men might be worked 12 hours a day, when emergency required, and laid off when work was slack. Congress has chosen in this legislation to take the eight-hour day as the standard, and has provided no other. For me, now, to adopt another would not be construction; it would be legislation.

That the schedule desired by your correspondents will be acceptable to their employees and, perchance, more favorable to their physical and moral well-being than a strict eight-hour schedule is a consideration proper to the legislative department, and to it only. As a matter of the construction of the act of March 4, 1911, to which, of course, I am confined, I am of the opinion that the phrase "an eight-hour workday" does not authorize the establishment of a schedule by which the employees work more than eight hours in any one day.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

ARMS AND MUNITIONS OF WAR.

The words "arms or munitions of war," within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to any American country in which conditions of domestic violence are found to exist, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. Such articles as come within the definition of "arms or munitions of war" are herein enumerated.

Foodstuffs, ordinary clothing, and ordinary articles of peaceful commerce are not included in the prohibition.

DEPARTMENT OF JUSTICE,

March 25, 1912.

SIR: You have referred to me some correspondence with the Acting Secretary of State regarding the practical interpretation to be given to the prohibition contained in the joint resolution of Congress passed March 14, 1912, and the proclamation issued by you, in pursuance thereof, making it unlawful to export, except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to any American country in which conditions of domestic violence are found by the President to exist, etc.

You ask my opinion as to the proper interpretation to be given to the words "arms or munitions of war." There is no dispute as to the meaning of the word "arms," but a question arises as to the precise import of the phrase "munitions of war." The word "munition" is defined in Skeat's Etymological Dictionary as "materials used in war." It is derived from the verb *munire*, to fortify; and perhaps its nearest antecedent is *munitionem*—the accusative of *munitio*, a blockading, defending, or securing—hence its analogy to ammunition, store for defense. Accordingly the Standard Dictionary defines it as "Ammunition and all necessary raw material, including stores of every kind; all requisites for warfare, exclusive of money and men." The Century Dictionary and Cyclopedia defines it as "Materials used in war for defense or for attack; war material; military stores of all kinds; ammuni-

tion, provisions." Webster's International Dictionary, as "Whatever materials are used in war for defense or for annoying an enemy; ammunition; also stores and provisions; military stores of all kinds; hence necessary equipment or provision in general."

Although many of these definitions embrace in the definition of the word *munition* not only materials for attack or defense, but stores or provisions, a distinction is drawn by the writers on international law between munitions of war proper and those articles which from their particular use *may become* munitions of war. The phrase is used in connection with definitions of the term "contraband of war." Articles which are contraband of war have been classed under two heads:

"Those that are primarily and ordinarily used for military purposes in time of war, e. g., arms and munitions of war; military material, &c.; articles of this kind being usually described as absolutely contraband" (7 Moore's Digest, 666).

In the instructions given by Mr. Cass, Secretary of State, to Mr. Mason, minister to France, in June, 1859, speaking of the term "contraband of war," Mr. Cass wrote:

"Some of the later and approved writers upon the law of nations, such as Hautefeuille and Ortolan \* \* \* and the former particularly, confines the list" of contraband of war "to objects of first necessity for war, and which are exclusively useful in its prosecution, and which can be directly employed for that purpose without undergoing any change—*that is to say, to arms and munitions of war*" (7 Moore's Digest, 661).

Among articles *absolutely* contraband, according to the orders of the Navy Department, given June 20, 1898, are "ordnance, machine guns, and other articles of military or naval warfare." Among those *conditionally* contraband are coal, "when destined for a naval station, a port of call, or ship or ships of the enemy," and provisions "when destined for the enemy's ship or ships or for a place that is besieged" (7 Moore's Digest, 687).

"Articles which, like arms and ammunition are, by their nature, of self-evident warlike use, are contraband of war if destined to enemy territory" (Mr. Hay to Minister McCormick, Aug. 30, 1904, 7 Moore's Digest, 692).

Ortolan considers, "que les armes et instruments de guerre quelconques, et les munitions de toute sorte servant directement à l'usage de ces armes, sont les seuls objets qui soient généralement et nécessairement contrebande de guerre \* \* \*" (Hall Int. Law, 6th ed. 649).

"L'idée de la contrebande," says Heffter (*Le Droit* 160), "est une idée complexe, variable selon les temps et les circonstances, et qu'il est difficile de déterminer d'une manière absolue et constante \* \* \* D'après les usages internationaux universels, la contrebande est exclusivement limitée aux armes, utensiles et munitions de guerre, en d'autres termes aux objets façonnés et fabriqués exclusivement pour servir dans la guerre, non pas aux matières premières propres à la fabrication d'objets prohibés \* \* \*" (Hall, 649).

Lord Lansdowne in writing to Lord Hardinge in August, 1904, refers to the first class of articles contraband of war as—

"Those that are primarily and ordinarily used for military purposes in time of war; e. g., arms and munitions of war, military material, &c.—articles of this kind being usually described as absolutely contraband" (7 Moore's Digest, 666).

At the international conference held in London during the winter of 1908–9, a list of articles which without notice may be treated as absolutely contraband was prepared as follows:

"1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

"2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

"3. Powder and explosives specially prepared for use in war.

"4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

"5. Clothing and equipment of distinctively military character.

"6. All kinds of harness of a distinctively military character.

"7. Saddle, draft, and pack animals suitable for use in war.

"8. Articles of camp equipment and their distinctive component parts.

"9. Armor plates.

"10. Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

"11. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea."

This list includes substantially all of the articles which may be considered as absolutely within the definition of "arms and munitions of war."

Food and clothing may become contraband of war when destined to a port of naval equipment or an enemy, or for the supply of his army (7 Moore's Digest, 679); but they are classed as *conditionally* contraband, and not as absolutely contraband, and do not fall within the usual definition of arms and munitions of war. The case of *United States v. Sheldon* (2 Wheaton, 119) which is sometimes cited in support of the inclusion of provisions with other articles under the definition of munitions of war, turned upon a statute which prohibited the transportation of "naval or military stores, arms or munitions of war, or *any articles of provision* from the United States to Canada," etc.

The substance of the joint resolution of Congress itself emphasizes the construction which is here suggested of the phrase in question. It provides that whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, he may, by proclamation, make it unlawful to ex-

port arms or munitions of war. Therefore it is *such* arms or munitions of war as are used in promoting conditions of domestic violence, the export of which is forbidden; that is to say, weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. These are the things the use of which promotes conditions of domestic violence and the export of which the President's proclamation is intended to prohibit.

As a practical working definition for the use of the officials on the border, without embracing all of the items enumerated in the first list adopted at the Conference of London, I suggest the following as embracing all that is within the practical purpose which the joint resolution and the proclamation are intended to accomplish, namely:

Articles primarily and ordinarily used for military purposes in time of war, such as weapons of every species used for the destruction of life, and projectiles, cartridges, ammunition of all sorts, and other supplies used or useful in connection therewith, including parts used for the repair or manufacture of such arms, and raw material employed in the manufacture of such ammunition; also dynamite, nitroglycerin or other explosive substances; also gun mountings, limber boxes, limbers, military wagons; field forges and their component parts, comprising equipment of a distinctively military character; articles of camp equipment and their distinctive component parts; and implements manufactured exclusively for the manufacture of implements of war, or for the manufacture or repair of arms or war material.

Foodstuffs, ordinary clothing, and ordinary articles of peaceful commerce are not included in the prohibition.

I am transmitting this definition to the Departments of State, War, and the Treasury.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.



## PHILIPPINE ISLANDS—POSTAL SERVICE.

The Postmaster General has no authority to arrange a special parcel-post service or to conclude arrangements for money-order exchanges with the Philippine Islands under the power conferred upon him by sections 398 and 4028 of the Revised Statutes.

The power to negotiate and conclude money-order and parcel-post conventions or agreements with foreign governments, which shall cover the mail and money-order service between the Philippine Islands and such foreign governments, resides, not in the Postmaster General, but in the government of the Philippine Islands.

DEPARTMENT OF JUSTICE,  
*March 29, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of November 22 last, submitting to me for an opinion two questions involving the relation of your department to the postal administration of the Philippine Islands.

Your first question is as to your right, under section 398 of the Revised Statutes, to arrange a special parcel-post service with the Philippine Islands providing, for example, for an 11-pound maximum weight limit, instead of the 4-pound maximum specified by law as to the domestic service.

Section 398 of the Revised Statutes is as follows:

"SEC. 398. For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries."

You also call my attention to section 4028, Revised Statutes, which authorizes the Postmaster General to conclude arrangements for money-order exchanges "with the post departments of foreign Governments, with which postal conventions have been, or may be, concluded."

It is settled by the decision in *De Lima v. Bidwell*, 182 U. S. 1, that the Philippine Islands are not a "foreign country" nor is its government a "foreign Government"

within the ordinary meaning of those words in statutes of the United States. It is therefore clear that Revised Statute 398 and Revised Statute 4028, *supra*, do not have reference to postal arrangements between the Postmaster General and the postal authorities of the Philippine Islands. Presumably such postal intercourse must be regulated as is the domestic postal service, at any rate to the extent of conforming therein to any specific provisions of law regulating such domestic service.

Your second question concerns your right to make postal or money-order conventions with foreign Governments which shall cover the mail and money-order service between the Philippine Islands and such foreign Governments.

It appears that the Secretary of War has ruled that the Philippine government has the jurisdiction to conclude conventions with foreign Governments as to postal matters, as well as to money orders, when they relate to the Philippine Islands solely, this power being incidental to its control, by virtue of the organic act of July 1, 1902, of its own domestic postal service.

The determination of this question is not free from difficulty. The power of the Postmaster General to enter into conventions relating to postal service or money orders with foreign countries, whether involving the Philippine Islands or not, must be derived from sections 398 and 4028 Revised Statutes, *supra*. In 19 Op. 513, Solicitor General Taft, with the approval of Attorney General Miller, held that these sections did not involve the treaty-making power, but, by long usage, had been placed outside it. He said (p. 520):

“From the foundation of the Government to the present day, then, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster General power to conclude conventions with foreign Governments for the cheaper, safer, and more convenient carriage of foreign mails. The existence of such

a power in Congress may, perhaps, be worked out from the authority given to that body in the seventh clause of section 8, of Article I, of the Constitution, to establish post offices and post roads. This has always been construed to mean power to organize and carry on the Post Office Department. Foreign mail is so closely connected with a proper system of inland mail as that the power to organize and carry on a general post-office system would seem to imply a power to organize, in connection therewith, a system of foreign mails, and, in the maintenance of such a system, a power to conclude contracts with the post-office departments of other countries."

I believe this view, that the right to conclude conventions with foreign countries as to mails and money-order exchanges is incidental to the power to establish post offices and post roads, to be sound. No doubt the same ends could be constitutionally accomplished by the exercise of the treaty-making power, but, as that power has only once been employed for that purpose (19 Op. 517, 518), and as the general usage, illustrated by sections 398 and 4028, Revised Statutes, *supra*, has been to proceed under enactments of Congress founded on its authority to establish post offices and post roads, your second question resolves itself to the inquiry, Where has Congress, if that body has acted at all on the subject, deposited the power to conclude conventions affecting the postal intercourse of the Philippine Islands with foreign countries? In my opinion, if sections 398 and 4028, Revised Statutes, *supra*, stood alone, they would be sufficient to place the negotiations of such conventions or arrangements within the jurisdiction of the Postmaster General. The subject matter of section 398 is the conveyance of mails "between the United States and foreign countries." Since the allusion here is evidently to the United States as a physical body to and from which mails may be conveyed, the term "United States" in the section must refer, not to the United States as a body politic or to the various States composing that body politic, but to all the *country* of any kind under the jurisdiction of the United States, whether

it be within the boundaries of a State or of a Territory or of one of the possessions. The term, therefore, would include the Philippine Islands, though not a possession of the United States at the time Revised Statute 398 was passed. (*De Lima v. Bidwell*, 182 U. S. 1.) This same construction must be given to Revised Statute 4028, since this section evidently refers to the same subject matter as Revised Statute 398.

In order, however, to determine whether the above sections are applicable to conventions regulating postal intercourse between the Philippine Islands and foreign countries, it is necessary to examine the legislation of Congress in regard to those islands, because, if the power to conclude postal conventions with foreign countries is in Congress, Congress can, in the exercise of its plenary sovereignty over the Philippine Islands, delegate that power to the Philippine government, just as it has delegated to that government the power to coin money. (*Ling Su Fan v. United States*, 218 U. S. 302; *United States v. Heinszen & Co.*, 206 U. S. 370.) By the instructions of the President of April 7, 1900, legislative power over the Philippine Islands was transferred to a commission, subject to the approval of the President, through the Secretary of War, the executive power being left with the military governor. By order of the President, through the Secretary of War, of June 21, 1901, the executive power was transferred to a civil governor, and this action of the President had congressional sanction in the Spooner amendment of March 2, 1901 (31 Stat. 895, 910.) No doubt postal service existed in the Philippines prior to the military occupation and was continued by the military authorities. At any rate, the commission, which began its work on September 1, 1900, on October 15, 1900, by act No. 23 made an appropriation for the director of posts, including the expense of outgoing foreign mail. By act No. 102, of March 9, 1901, the salaries of the director general of posts and of the employees were fixed, and by section 4 of the act No. 181, of July 25, 1901, the director general is given power to establish post offices. By act No. 222, of Septem-

ber 6, 1901, after reciting that the President, through the Secretary of War, has directed the establishment of four departments, one of which is the department of commerce and police, it is provided that the department of commerce and police shall have under its executive control, *inter alia*, "the bureau of post offices." The above establishment by the President of legislative and executive government in the islands, and the action of the commission in establishing a bureau of post offices under the control of the department of commerce and police, was ratified by Congress in section 1 of the organic act of July 1, 1902, and the continuance of the legislative and executive government, as above described, provided for, subject to the change in the legislative power to occur by the coming into existence of the legislative assembly and subject to the reserved power of Congress to annul legislative acts. By section 87 of the same act the Bureau of Insular Affairs of the War Department was created to exercise, under the authority of the Secretary of War, the jurisdiction of the War Department over the islands. It thus appears that Congress, acting by virtue of its full sovereignty over the islands, has granted legislative power therein to the commission, to be succeeded by a legislative assembly as to certain portions, and executive power to a civil governor, responsible to the Secretary of War, acting through the Bureau of Insular Affairs.

On October 26, 1905, by section 15 of the reorganization act, No. 1407, the commission provided that—

"The bureau of posts shall have exclusive jurisdiction and control of all mail and postal business within the maritime jurisdiction of the Philippine Islands."

The commission has also provided for the carriage of mails between the islands by coast-guard or Government vessels, but, so far as I am aware, no act has been passed purporting to regulate, or granting power to others to regulate, postal intercourse between the Philippines and foreign countries.

It thus appears that the Philippine postal administration is a wholly autonomous system, independent of the

administration's control. The delegation to the Philippine government, subject to the control of the Secretary of War, of executive control over post offices and post roads within the Philippine Islands, resulting from the various acts above referred to, carried with it the grant of all incidental powers necessary to make such delegation effective. The case *Ling Su Fan v. United States*, *supra*, is very significant in this connection. Congress, by the organic act of July 1, 1902, section 76 *et seq.*, and by sections 2 and 6 of the act of March 2, 1903, chapter 980, granted to the Philippine Islands authority to coin money, to fix a standard of value, to coin silver pesos, and to adopt such measures as might seem proper to maintain the parity between the gold and silver coins. This was held to justify a law of the commission prohibiting the export of silver coin and bullion. The court said (218 U. S. 310) :

"The power to 'coin money and regulate the value thereof, and of foreign coin,' is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress."

And further (p. 311) :

"\* \* \* There can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin."

So the grant by Congress to the Philippine government of the power to establish post offices and post roads in the islands carried with it as an incident to its exercise the authority to enter into agreements with other countries concerning foreign mail. For, as Solicitor General Taft in the above-quoted opinion said :

"Foreign mail is so closely connected with a proper system of inland mail as that the power to organize and carry on a general post-office system would seem to imply a power to organize, in connection therewith, a system of foreign mails, and, in the maintenance of such a system, a

power to conclude contracts with the post-office departments of other countries.”

Congress must have understood that the situation of the islands and the great importance to them of communication with foreign countries, and especially with the East, made it impracticable, if not impossible, to carry on an effective local post-office system without the authority to conclude arrangements with foreign countries by which the local system might be projected beyond the boundaries of the islands themselves.

The practice of the Post Office Department is in accord with this conclusion, for the Postmaster General has conceded the authority of the Philippine government to directly negotiate with foreign Governments for money-order conventions. As late as December 20, 1911, the Postmaster General returned a draft of a proposed money-order convention between the Philippine Islands and the Straits Settlements colony to the State Department for submission to the director of posts of the Philippine Islands, on the ground that the Philippine government had “plenary power to conclude money-order conventions with other countries.” There is no evident ground of distinction between money-order conventions and parcel-post conventions, the extent of the authority of the Postmaster General of the United States over one is precisely the same as over the other form of arrangement, and to admit the authority of the Philippine government to negotiate for money-order conventions carries with it, necessarily, a recognition of its power to enter into any other form of convention relating to postal communication.

I am of the opinion, therefore, that the power to negotiate and conclude the conventions or agreements to which you refer resides, not in the Postmaster General, but in the government of the Philippine Islands.

Respectfully,

GEORGE W. WICKERSHAM

The POSTMASTER GENERAL.

**EXPORTATION OF ARMS, AMMUNITION, AND MUNITIONS  
OF WAR TO THE DOMINICAN REPUBLIC PROHIBITED.**

The President's proclamation of October 14, 1905 (34 Stat. 3183), prohibiting the export of arms, ammunition and munitions of war to the Dominican Republic, pursuant to a joint resolution of April 22, 1898 (30 Stat. 739), is still operative under the amended joint resolution of March 14, 1912.

DEPARTMENT OF JUSTICE,

*April 11, 1912.*

SIR: I am in receipt of your letter of April 5 making the inquiry hereafter to be mentioned, in reply to which I have to state:

By a joint resolution of Congress, approved April 22, 1898, it was provided—

“That the President is hereby authorized, in his discretion, and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered by the President or by Congress.” (30 Stat. 739.)

Pursuant to the authority conferred by that resolution, President Roosevelt, by a proclamation dated October 14, 1905, did declare and proclaim—

“that the export of arms, ammunition and munitions of war of every kind, from any port in the United States or in Porto Rico to any port in the Dominican Republic, is prohibited, without limitation or exception, from and after the date of this my proclamation until otherwise ordered by the President or by Congress.” (34 Stat. 3183.)

So far as I am advised, it has not been otherwise ordered by the President or by Congress than is declared in such proclamation, unless the joint resolution next to be referred to shall have that effect.

By a joint resolution approved March 14, 1912, the joint resolution of April 22, 1898, above quoted, was amended to read as follows:

“That whenever the President shall find that in any American country conditions of domestic violence exist



which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress."

You now inquire whether, under this joint resolution, it is now unlawful to export arms and ammunition from the United States to the Dominican Republic under the President's proclamation of October 14, 1905, notwithstanding the amending of the joint resolution of April 22, 1898.

So far as the subject matter of the proclamation of October 14, 1905, is concerned it falls squarely within the provisions of the amended joint resolution of March 14, 1912, because it prohibits the export of arms and munitions of war, which is precisely what Congress, by the amending resolution, prohibits. It is true that the amending resolution bases the President's power to prohibit such export upon his finding "that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States," whereas by the joint resolution of April 22, 1898, the President is generally authorized, in his discretion, to prohibit such export, and it is not necessary that the exercise of that discretion be predicated upon a finding such as is required by the resolution of March 14, 1912. However, the later resolution does not in any way invalidate the proclamation issued under the authority of the previous resolution, which, by its terms and in accordance with the act of its promulgation, is to continue operative until otherwise ordered by the President or by Congress.

In my opinion, therefore, the prohibition contained in the proclamation of October 14, 1905, is still operative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

## OCEAN MAIL SERVICE—ADVERTISEMENTS—CONTRACTS.

In contracting for the carriage of the mails between ports of the United States and ports on the Isthmus of Panama, pursuant to the act of March 3, 1891 (26 Stat. 830), the Postmaster General is required to advertise for separate proposals and to make a separate contract for each separate and distinct line of service. The word "route," as used in section 1 of the above-mentioned act, means the course or way to be traveled in going from one place to another.

DEPARTMENT OF JUSTICE,

*April 12, 1912.*

SIR: I beg to acknowledge the receipt of your letter of the 22d ultimo, requesting my opinion as to your authority under the act of March 3, 1891 (26 Stat. 830), to advertise and contract for certain ocean mail service between ports in the United States and ports on the Isthmus of Panama. Your letter states:

"Advertisements for ocean mail service pursuant to the act of March 3, 1891, on three routes, from Atlantic and Pacific ports to the Isthmus of Panama, were issued by the Department last summer but failed to bring proposals for the desired service. The Department desires to readvertise for the service, somewhat extending the scope of the proposals by adding a service for 14-knot steamers, as follows:

"One route to provide a weekly service in 16-knot steamers to Colon and Panama from New York and New Orleans, and from San Francisco, respectively; the other route to provide a service in 14-knot steamers three or four times a month to Colon and Panama from Boston, Philadelphia, and Baltimore, and from Seattle, respectively.

"You will note that the service from New York, New Orleans, and San Francisco to the Isthmus, which was previously separated into three routes, would be combined in a single route. This is also true of the service from Boston, Philadelphia, Baltimore, and Seattle. It is thought that an advertisement drawn in this manner would secure bids for the service desired and would obviate difficulties which prevented the Department from receiving bids under the previous advertisement. It is believed that the fact that the successful bidder on either route could perform service

from one of the Atlantic ports to Colon, send the ship through the canal to San Francisco or Seattle, and perform service from those ports to Panama on the return voyage would make the operation of the vessels commercially possible, a requisite to the submission of a proposal.

“At the same time it should be noted that while the routes described have different termini in the Republic of Panama, the purpose of the service on both the Atlantic and Pacific side of each route is to provide improved mail and freight connections to Central and South America. As you are aware, Colon and Panama are on the direct route to the north-coast ports of Colombia and to Venezuela, and to west-coast ports of Central and South America, respectively.

The draft of an advertisement for proposals for the desired service, which accompanies your letter, contains the following statements:

“Proposals will be received at the Post Office Department, Washington, D. C., until 4.30 p. m. October 1, 1912, for ocean mail service pursuant to the act of March 3, 1891, on the routes hereinafter described, service to commence not later than January 1, 1915. The right is reserved to reject all bids.

“SCHEDULE OF ROUTES.

“VESSELS OF THE SECOND CLASS.

“No. 81, ‘O. M. S.’ From New York every two weeks, 26 trips a year, calling at Key West, and from New Orleans every two weeks, 26 trips a year, to Colon; also from San Francisco to Panama once each week, 52 trips a year, calling at San Pedro and San Diego, at the election of the Department. Time from New York to Colon not to exceed 6 days and from New Orleans to Colon 4 days, and from San Francisco to Panama 10 days. Contract for 10 years. Bond required with bid \$275,000.

“VESSELS OF THE THIRD CLASS.

“No. 82, ‘O. M. S.’ From Boston every 28 days, 13 trips a year, from Philadelphia every 28 days, 13 trips a year, and from Baltimore every 28 days, 13 trips a year, to

Colon, calling at least twice a month at Norfolk, Wilmington, Charleston, and Savannah; also from Seattle or Portland about every 10 days, 39 trips a year, to Panama, calling at Astoria, San Francisco, San Pedro, and San Diego, all calls to be made at the election of the Department. Time, Seattle to Panama 16 days, Boston to Colon  $6\frac{1}{2}$  days, Philadelphia and Baltimore via southern ports  $7\frac{1}{2}$  days. Contract for 10 years. Bond required with bid \$125,000."

The first section of the act of March 3, 1891 (26 Stat. 830, 831), under which the ocean mail service referred to is sought to be established, provides:

"That the Postmaster General is hereby authorized and empowered to enter into contracts for a term not less than 5 nor more than 10 years in duration, with American citizens, for the carrying of mails on American steamships between ports of the United States and such ports in foreign countries, the Dominion of Canada excepted, as in his judgment will best subserve and promote the postal and commercial interests of the United States, the mail service on such lines to be equitably distributed among the Atlantic, Mexican Gulf, and Pacific ports. Said contracts shall be made with the lowest responsible bidder for the performance of said service on each route, and the Postmaster General shall have the right to reject all bids not in his opinion reasonable for the attaining of the purposes named."

Section 2 requires that—

"before making any contract for carrying ocean mails in accordance with this act the Postmaster General shall give public notice by advertising once a week, for three months, in such daily papers as he shall select in each of the cities of Boston, New York, Philadelphia, Baltimore, New Orleans, St. Louis, Charleston, Norfolk, Savannah, Galveston, and Mobile, and when the proposed service is to be on the Pacific Ocean, then in San Francisco, Tacoma, and Portland."

That section further provides:

"Such notice shall describe the route, the time when such contract will be made, the duration of the same, the size of the steamers to be used, the number of trips a year, the

times of sailing, and the time when the service shall commence, which shall not be more than three years after the contract shall be let. The details of the mode of advertising and letting such contracts shall be conducted in the manner prescribed in chapter 8 of title 46 of the Revised Statutes for the letting of inland mail contracts so far as the same shall be applicable to the ocean mail service."

Section 3 requires that the steamships shall be of American build, owned and officered by American citizens, and manned in certain proportions by American crews. This section also divides such steamships into four classes and specifies the manner and material of their build, tonnage, and rate of speed, particulars which differ with the class. Section 4 provides that the ships shall be constructed according to plans and specifications approved by the Secretary of the Navy and of sufficient strength to be readily convertible into cruisers. Section 5 fixes the maximum rate of compensation to be paid for such ocean mail service to the ships of each class at so much a mile, "by the shortest practicable route, for each outward voyage." The other sections of the statute are inapplicable to the question under consideration.

This statute gives you a large discretion in contracting for the carriage of the mails in American steamships between ports of the United States and ports in foreign countries, but it limits your authority by providing (sec. 1) that "said contracts shall be made with the lowest responsible bidder for the performance of said service on each route." This provision requires a separate contract for each separate and distinct line of service. The word "route" means the course or way to be traveled in going from one place to another. (Standard Dict.; Webster's Dict.; *Attorney General v. West Wisconsin Railway*, 36 Wis. 466, 494.) So, stoppages between the point of departure and the point of destination are said to be made "en route," i. e., on the road or way. There is no doubt as to the meaning of the word, and it appears to have been used in the statute in its ordinary sense. Thus, section 2 of the act provides that "such notice *shall describe the route*, the time when such contract will be made, the duration of same, the size of the

steamers to be used, the number of trips a year, the times of sailing," etc., corresponding in this respect to the provisions of the Revised Statutes in respect to letting inland mail contracts (chap. 8 of Title XLVI), which it is said shall govern the details of advertising and letting ocean mail service contracts. So, also, section 5 of the act fixes the rate of compensation to ships of each class for such service at so much per mile, "by the shortest practicable route, for each outward voyage."

Looking at proposed schedule No. 81, for vessels of the second class, it will be seen that it provides for ocean mail service (1) between New York and Colon, calling at Key West, (2) between New Orleans and Colon, and (3) between San Francisco and Panama, calling at San Pedro and San Diego, at the election of your Department. Here are three separate and distinct lines of service, the third separated from the first two by a whole continent, which it is proposed by mere designation to include in one "route." If this could be done the service specified in route No. 82, for vessels of the third class, might also be included, the difference in the class of the vessels merely affecting the matter of compensation. In fact, upon this theory, the entire ocean mail service between the United States and foreign countries, from both Atlantic and Pacific ports, might be let under one contract, and thus a complete monopoly with respect to such service established.

There is nothing in the language or purpose of the act that justifies this construction. In fact, it is plainly inhibited by the requirement of section 1, that "said contracts shall be made with the lowest responsible bidder for the performance of said service on each route," which is intended to avoid monopoly by securing the fullest competition. Furthermore, the provision of section 2 that notice of the service desired shall be given by advertisement in daily papers of certain cities located in the eastern part of the United States, but "when the proposed service is to be on the Pacific Ocean, then in San Francisco, Tacoma, and Portland," shows that Congress contemplated that the service on the Atlantic and Pacific Oceans would be the subject of separate contracts.

394 *Exportation of Saddles, Bridles, etc., to Mexico.*

I may add that my attention has been called to nothing in other statutes in relation either to the ocean or the inland mail service or the practice of the Post Office Department thereunder which justifies the construction sought to be placed upon the act of March 3, 1891. I have the honor, therefore, to advise you that, in my opinion, the proposed method of advertising and contracting for ocean mail service under that statute is illegal.

Respectfully,

GEORGE W. WICKERSHAM.

THE POSTMASTER GENERAL.

---

EXPORTATION OF SADDLES, BRIDLES, CANTEENS AND  
CARBINE SCABBARDS TO MEXICO.

The exportation of saddles, bridles, canteens, and carbine scabbards by merchants in the United States to other merchants in Mexico falls within the purview of the President's proclamation of March 14, 1912, prohibiting the export of arms or munitions of war to that country.

DEPARTMENT OF JUSTICE,

*April 20, 1912.*

SIR: You have referred to me for my opinion a letter from the Secretary of the Treasury asking whether the exportation of saddles, bridles, canteens, and carbine scabbards by merchants in the United States to other merchants in Mexico falls within the purview of your proclamation of the 14th of March.

The articles mentioned are clearly articles of military equipment. As said in my opinion to you of the 25th of March, the object of the joint resolution is to forbid the exportation "of *such* arms or munitions of war as are used in promoting conditions of domestic violence." While saddles and bridles are also used in peaceful pursuits, they, as well as canteens and carbine scabbards, are among the munitions of war which are now being used in promoting the disturbances in Mexico.

I think, therefore, that the question should be answered in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

EIGHT-HOUR LAW—REPAIRS TO GOVERNMENT VESSELS.

The employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the eight-hour law of August 1, 1892 (27 Stat. 340).

DEPARTMENT OF JUSTICE,

*May 10, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, in which you request my opinion as to whether the act of August 1, 1892 (27 Stat. 340), is applicable to contracts for repairs to light vessel No. 81 and the tender *Magnolia*, which are owned by the Government.

That act limits and restricts the service and employment of all laborers and mechanics who may be employed by any contractor or subcontractor "upon any of the public works of the United States" to eight hours in any one calendar day. In *Ellis v. United States* (206 U. S. 246, 258, 259) the Supreme Court in construing the act said:

"\* \* \* The words 'upon' and 'any of the,' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. \* \* \* The language of the acts is 'public works of the United States.' As the works are things upon which the labor is expended, the most natural meaning of 'of the United States' is belonging to the United States."

It was held in that case that persons employed by a contractor with the Government upon vessels and scows in dredging a harbor "were not laborers and mechanics and were not employed upon any of the public works of the United States within the meaning of the act." This holding, as well as other language of the opinion in that case, indicates that the majority of the court did not regard dredging work as having "permanent existence," or "structural unity," or "capable of being regarded as com-



plete wholes," or as "belonging to the United States." A Government vessel is manifestly not subject to these objections.

The act of August 13, 1894, whose title was "An act for the protection of persons furnishing materials and labor for the construction of *public works*," as amended February 24, 1905 (33 Stat. 811), provides that any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of *any public work*, shall be required to give bond with certain conditions.

In *Title Guaranty & Trust Co. v. Crane Company* (219 U. S. 24), the Supreme Court held that a vessel being constructed for the United States under contract, where title passed to the United States as the vessel was completed, was "a public work" within the meaning of the last-mentioned act. The court said (p. 33):

" \* \* \* The argument that the vessel was not a public work loses most of its force when it appears that the title was in the United States as soon as the first payment was made. Of course public works usually are of a permanent nature and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read 'any public work' as confined to work on land. It is not necessary to discuss in detail some opinions from the Attorney General's office in cases where the title to the vessel did not pass that looked rather in the opposite direction. It is enough to say that there has been no such clear and established construction as to cause us to yield our own view. On the other hand, the decision of some other courts has been in accord with the judgment below and with what we now decide." (*United States v. Perth Amboy Ship-building & Engineering Co.*, 137 Fed. Rep. 689, 693. *Ameri-*

*can Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. Rep. 717, 719. *United States v. Aetna Indem. Co.*, 40 Washington, 87.)

In view of these decisions of the Supreme Court, I am of the opinion that the employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the act of August 1, 1892.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

RETIRED OFFICERS OF ARMY AND MARINE CORPS ARE  
OFFICERS IN THE EMPLOY OF THE GOVERNMENT.

An officer of the United States Army or of the Marine Corps, retired from active service only, and not wholly retired from service, is an officer in the employ of the Government, and so within the prohibition of section 1782 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

*May 17, 1912.*

SIR: The Attorney General has referred to me yours of the 13th to him, transmitting the letter of Maj. Henry Leonard, United States Marine Corps, to you of date May 9, in which Maj. Leonard requests that the opinion of the Attorney General be obtained "as to the status of a retired officer with relation to section 1782, Revised Statutes of the United States."

The section in question is as follows:

"No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial,

bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States."

It is true, as suggested by Maj. Leonard in his communication to you, that this section is a penal statute, and is therefore to be strictly construed, but none the less full effect is to be given to the intention of Congress as manifested by the terms of the enactment.

The terms of the statute are comprehensive. They extend to every "officer or clerk in the employ of the Government." The prohibition is not simply upon those who because of official position or relation may be able to help or hinder the interests or ambitions of those before whom they appear, but extends to every officer or clerk in the employ of the Government, whatever his rank or function. As first introduced in the first session of the Thirty-eighth Congress the bill was limited in its scope to Members of Congress; and in the discussion of the measure stress was laid upon the influence which Members could exert upon the Departments and upon courts-martial, through their legislative powers, and especially upon the sinister influence which might be exerted by Senators because of their power to reject or to confirm nominations to office. But in the course of its passage through Congress the bill was broadened to include any and every officer and clerk in the employ of the Government. The amendment implied that there was a peculiar opportunity for influence inherent in official position, whatever its dignity, and in the associations of office, which, while it might be properly used, if the prompting to it was one of public spirit or duty, should not be used as a means of pecuniary advantage to the individual holding the position, as in such case opportunities conferred by the Government might be used to its detriment. The statute is a penal enactment, but it

had a remedial purpose, and it was plainly the intent of Congress to make the remedy an adequate one, and so, instead of selecting and enumerating in detail all the offices and positions in which the danger of abuse was apparent, Congress made sure of its purpose by including generally every officer and clerk in the employ of the Government. Senator Trumbull, chairman of the Judiciary Committee, who reported the bill with this amendment, among others, said in the course of the discussion:

"This is not a bill to prevent attorneys from practicing in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for advocating claims in the Department and before the bureaus of the Government, and before courts-martial. That is the particular question that is pending." (Cong. Globe, pt. 1, 1st sess. 38th Cong. 555; 561.)

It was clearly within the power of Congress to make the statute comprehensive of everybody in the employ or pay of the Government, and the nature of the case called for a general, rather than for a limited, designation of the persons to be prohibited.

It is suggested that the designation of "officer or clerk" is limited by the words "in the employ of the Government." These words were not in the law as originally enacted, which, so far as concerned the persons prohibited, read:

"That no member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a Department, head of a bureau, clerk, or any other officer of the Government receive or agree to receive, etc." (13 Stat. 123.)

The law became and is section 1782 of the Revision of 1873, and now reads:

"No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive, etc."

Saving the inclusion of a Delegate to Congress, the change in the law is one merely of style or wording.

"Head of a bureau" is omitted from the wording of the statute, but plainly remains within its scope. There are less words in the new description than in the old, and it might be further abbreviated without restricting its significance.

It is said that the law embraces only officers and clerks engaged in some "fixed or regular service or business." To this I can not agree. The qualifying words of the statute limit its designation to officers and clerks in some employ or service of the Government, a limitation that would no doubt be implied if it were not expressed. If the words "in the employ" were omitted from the statute its sense would not be changed. Certainly those words qualify the designation of "clerk" as much as that of "officer." I can not conceive of a clerk of the Government who is not in its employ or service, and the same is true of an officer. A man is not an officer of the Government if he is not in some way and to some extent in its employ or service.

The question then is whether or not a person on the retired list of the Marine Corps of the United States is an officer of the Government. In this respect the Marine Corps is to be considered as a part of the Army, for section 1622, R. S., provides:

"The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section."

The next section simply provides for the composition of the retiring board.

Attention is called to the case of *People v. Duane* (121 N. Y. 367), the ruling in which is undoubtedly to the effect that a retired Army officer is a pensioner rather than an official, and so is not within the terms of a statute of New York which provides as to aqueduct commissioners that "they and their successors shall hold no other Federal, State, or municipal office, except the office of notary public or commissioner of deeds." And to like effect is the case of *Reed v. Schon* (2 Cal. App. 57). In this case

the constitution of California was under consideration. It provided that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this State." The court held that the position of a retired Army officer "is a mere sinecure, without any duties attached to it; and hence that it can not properly be called an office." And it is said in this case that the expression "retired officer" may "be regarded as fairly synonymous with the words 'ex officer,' or 'ci-devant officer,' and implies that he is no longer an officer in the proper sense of the term."

These cases deny proper effect to the statutes of the United States, which fix the status of retired officers.

The first section of the act of February 2, 1901, 31 Stat. 748, deals with the composition of the Army, and provides that it shall consist of certain regiments of Cavalry and Infantry, a corps of Artillery, certain officers, and departments, and "the officers and enlisted men of the Army on the retired list." So by positive declaration of statute these men are not pensioners, but soldiers, not "ex" or "ci-devant," but actual soldiers, incorporated into the Army as an existing, integral part of it, by the same law and the same section of the law, which makes their brothers on the active list a part of the Army.

Chapter 2 of title 14 of the Revision deals with retirement, and it provides for retirement from the service and for retirement from active service.

Section 1275, R. S., provides as to officers who are retired from the service that they "shall be entitled to receive, upon their retirement, one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

And this is all. These men are in the language of the section making this provision for them "wholly retired" from the service. They are "ex" or "ci-devant" officers.

But the case is very different as to retirement from active service. Section 1256, R. S., provides:

"Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be re-

tired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof."

Officers retired only from active service may not simply continue to wear the uniform of their rank, they are not simply continued upon the Army Register, but they are subject to Army discipline, and this can be only because they have not been wholly relieved from Army duties and obligations. They are still soldiers.

A number of provisions are to be found in the statutes regarding the detail of such officers for various purposes in times of peace, and of course they must respond to the orders of Government, whatever these may require, in times of war.

To the contrary of the New York and California cases is that of *State v. De Gress* (53 Texas, 387), and that of *Hill v. Territory* (2 Wash. Terr. 147), but we need not discuss them, inasmuch as the question has been determined by the Supreme Court of the United States, and its rulings must prevail.

In *United States v. Tyler* (105 U. S. 244) claim for increase of pay was made by an officer on the retired list under sections 1262 and 1263, Revised Statutes, which provide:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

"SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

The opinion of the court was by Mr. Justice Miller. He first notes the distinction between retiring wholly and retiring from active service, and says as to this (pp. 244 and 245):

"These sections are taken from the act of July 15, 1870, chapter 294, and constituted the law on that subject when

the appellee was retired, and their proper construction is the measure of his rights in this controversy. Section 1276 of the Revised Statutes was section 24 of the same statute and is in the following language: 'Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.'

"Section 1275 provides that 'officers wholly retired from the service shall be entitled to receive upon their retirement one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement.'

"There is, therefore, a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.

"In the latter case such reward or compensation as Congress thought proper to bestow, namely, one year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended. In the former case the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only."

The statute provides this increase of pay in terms for "each term of five years' service." This is not as a pension, and it can not therefore go to an "ex" or "ci-devant" officer. And so Tyler's case presented the question squarely whether an officer retired from active service was an officer of the United States in the service of the United States while thus retired and not under detail to any specific duty.

Mr. Justice Miller said (pp. 245 and 246):

"The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends there can be no increase on that account. As long as the service continues the increased pay applies whenever it amounts to five years.

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute inca-



capacity for further service. It may be based upon age, which, being fixed at a minimum of 62 years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may for many purposes be a very useful officer.

"The provisions of the statutes and the uniform treatment of these officers conform to this view and necessarily imply that, while not required to perform full service, they are a part of the Army, and may be assigned to such duty as the laws and regulations permit.

"Section 1094 of the revision designates specifically by a catalogue of 28 items of what the Army of the United States consists, and the twenty-seventh item of this enumeration is 'the officers of the Army on the retired list.'

"They are then by law a part of the Army.

"Section 1256 enacts that 'officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the Rules and Articles of War, and to trial by general court-martial for any breach thereof.'

"Section 1259 declares that they may be assigned to duty at the Soldiers' Home; and section 1260 that they may be detailed to serve as professors in any college.

"It is impossible to hold that men who are by statute declared to be a part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the Rules and Articles of War and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States. And if, because they were not required to do full service thereafter, their

compensation was diminished by the statute 25 per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the Government, and that the increased pay of 10 per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

As stated in *People v. Duane*, *supra*, the continuance of honor and emolument to officers retired from active service is in part in consideration of faithful service in the past, but it is also true, and that is the reason of the opinion in the Tyler case, ignored in the Duane case, that honor and emolument are continued to these officers, because they are continued in the service. They may not be always or ever actively engaged, their brothers on the active list may be sufficient for every present need of Government, but, like those brothers, they are always subject to the call of duty, and it is to be said of them, and was said of them in Tyler's case, that

"They also serve who only stand and wait."

In *Wood v. United States* (107 U. S. 414), the proposition decided was that the rank and pay of retired officers of the Army are subject to the control of Congress. In the course of the opinion it was said pertinently to the present question, "that, by section 1094 [R. S.] the officers of the Army on the retired list are a part of the Army of the United States, and, therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of Article II of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list, and to change his rank, while he holds the same office; and that in connection with this change of rank his pay may be changed."

In *Badeau v. United States* (130 U. S. 439), the eligibility of Army officers to civil office was under consideration.

Section 1222, R. S., provides:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

This, it was held, did not apply to officers on the retired list because limited in terms to those "on the active list."

Section 1223, R. S., provides:

"Any officer of the Army who accepts or holds any appointment in the diplomatic or consular service of the Government shall be considered as having resigned his place in the Army, and it shall be filled as a vacancy."

This, as it did not distinguish between them, was held to apply to officers on the retired as well as to officers on the active list. The court, having reference to the two sections quoted, said:

"No officer, whether on the active or retired list, could accept appointment in the latter (diplomatic or consular service) *and remain an officer*, but that rule was not applied to retired officers in the matter of holding a civil office."

This case is in direct contravention of the Duane case. It holds that a retired officer is an officer within the meaning of that word in statutes defining eligibility to civil office.

What constitutes service in the Army was considered in another aspect in *United States v. Morton* (112 U. S. 1). The question presented was whether the period passed by a cadet in study at West Point could be computed as "actual time of service in the Army," and the question was answered in the affirmative. The case of *United States v. Tyler, supra*, was cited approvingly, and the result of the two cases is that an officer of the Army is in the service of the Government from the time of his appointment as cadet until by resignation, death, or otherwise he is "wholly retired" therefrom.

The case of *Geddes v. United States* (38 Ct. Cl. 428), is cited as declaring a different rule. It arose under a very

different statute, viz, section 2, act of March 3, 1885 (23 Stat. 353, 356), which provides:

“That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government.”

Geddes was a captain of Infantry on the retired list. He served and received compensation as chief clerk of the Department of Agriculture. The question in the case was as to his right to receive pay as such clerk and as a captain on the retired list. The Court of Claims divided in opinion, three to two, the majority holding that he was. The majority said (p. 445):

“To bring a retired officer of the Army within the inhibition of the statute it is plain that he must be an ‘officer or employee of the Government’ within its intent; that his unofficial life after retirement must be regarded, within the intent of the statute, as service; that his three-fourths retired pay must be ‘salary as compensation’ for such service. It is well settled that an officer on the retired list owes no service to the Government in time of peace; that if called into service in time of war he returns thereby to the active list and receives full pay; that there is but one military office which he can hold, that of superintendent of the Soldiers’ Home; and that his reduced retired pay is but an honorary form of pension to be paid him when, having reached a certain age, it is presumed that he is no longer well fitted to render active service to the Government.”

This reasoning, as the minority hold, is in direct conflict with that of *United States v. Tyler*, *supra*, and can not be accepted as a correct statement of the law.

Other cases in the Court of Claims plainly indicate that this tribunal would hold an Army officer retired from active service to be, within the meaning of section 1782, an officer in the employ of the Government.

Section 5498, Revised Statutes, provides:

“Every officer of the United States, or person holding any place of trust or profit, or discharging any official func-

tion under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars or suffer imprisonment not more than one year, or both."

This section is certainly close akin to section 1782, and the principle of construction should be the same as to each.

It was moved in the Court of Claims (18 Ct. Cl. 25) to admit Capt. Tyler, the same officer who was claimant in the case in 105 United States, 244, as assistant counsel in the prosecution of certain claims against the Government. The motion was denied. The court said (pp. 27 and 28):

"Mr. Warden submitted an oral argument, and also a printed brief, in support of his motion, in which he took the position that it is proper to construe this provision as contemplating only persons in the *active* service of the Government; and that to apply it to the case of retired officers, at least as far as practice in the courts of justice is concerned, would be an utter violation of the spirit and intent of the enactment. And he urges, in the support of these positions, that a mischief was intended to be remedied by this provision, and that the mischief was one which could not be done by retired officers, but only by persons in the active service of the Government; and therefore that retired officers are not within the purview of the law.

"We do not feel authorized to concur in these positions."

The question arose again on a motion to admit Col. William Winthrop as counsel in a case pending in the

Court of Claims, 31 Ct. Cls. 35. The motion was denied, the court saying (pp. 39 and 40) :

"It is argued that a retired officer of the Army is not in a position to assist in or connive at frauds against the United States, and so is not within the mischief aimed at by the statute.

"The statute is not restricted to officers prosecuting claims arising within the purview of their duties, nor even arising in a department with which they are connected, or in which they may be supposed to exercise some influence, but it expressly includes '*every* officer of the United States \* \* \* who acts as an agent or attorney for prosecuting *any claim* against the United States, or in any manner, or by any means, otherwise than in the discharge of his proper official duties, aids or assists in the prosecution or support of *any* such claim,' etc.

"This entirely excludes the idea urged in behalf of the motion that retired officers are not subject to its provisions because they are not in a position to commit frauds in the prosecution of claims.

"Besides, we can not say that Congress did not consider it unbecoming and improper in any and '*every* officer of the United States,' whatever his position might be, to engage in the business of '*claim agent*' or attorneys in prosecuting claims against the Government independently of the temptations and opportunities to commit fraud."

My conclusion is that an officer of the United States Army or of the Marine Corps, retired from active service only, and not wholly retired from service, is an officer in the employ of the Government, and so within the prohibition of section 1782 of the Revised Statutes.

Respectfully,

F. W. LEHMANN,  
*Solicitor General.*

Approved.

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

## CIVIL SERVICE—DISTRICT OF COLUMBIA.

Under existing laws the classified service of the United States can not be extended to the officers and employees of the District of Columbia.

Opinion of April 28, 1898 (22 Op. 59), concurred in.

DEPARTMENT OF JUSTICE,

*May 17, 1912.*

SIR: I have the honor to reply to your letter of March 27 requesting an opinion upon the following question: Whether it is possible for you, as President, to extend the classified service to employees of the District of Columbia?

This same question was presented by President McKinley to Mr. Attorney General Griggs, who advised (22 Op. 59) that the authority did not exist.

After a thorough reexamination of the subject I have come to the same conclusion.

The provision of the civil-service act (22 Stat. 403) authorizing the extension of the classified service is subsection 3 of section 6, which reads as follows:

“That from time to time said Secretary, the Postmaster General, and each of the heads of departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, on the direction of the President and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.”

The District is not one of the “departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes,” for the word is there explicitly limited to the executive branches headed by Cabinet officers. (See also 26 Op. 210, and 18 Op. 161.)

The question, then, is whether the District is an “office” within the meaning of the section. At best it would involve a somewhat forced construction of that word to extend it so far, and rather the contrary inference is to be

drawn from the spirit of the act itself and the explanations made in the reports and the debates in Congress, and especially in the statements of Senator Pendleton, the author of the bill. (13 Cong. Rec. 82; 14 Cong. Rec. 206, 504, 507.)

In general the District has been held to be a separate municipal corporation and not a direct portion of the United States Government. It is not, for instance, exempt from liability for negligence of its employees as would be the case if it were merely a subordinate office of the Government. (*Barnes v. District of Columbia*, 91 U. S. 540; *District of Columbia v. Woodbury*, 136 U. S. 450; *Roth v. District of Columbia*, 16 App. D. C. 323.) The statute of limitations has been held to run against it on the ground that it did not so partake of the attributes of sovereignty as to be exempt from that statute. (*Metropolitan R. R. Co. v. District of Columbia*, 132 U. S. 1.) By the terms of the statute under which its present government was constituted it was expressly provided that "the District of Columbia shall remain and continue a municipal corporation" (20 Stat. 102). The laws governing the District are not "laws of the United States" within the provisions concerning right of appeal to the United States Supreme Court (*American Security and Trust Co. v. The Commissioners of the District of Columbia*, 224 U. S. 491), decided April 29, 1912; and under a decision of the Comptroller of the Treasury a contract entered into by the District is not a contract "made or entered into on behalf of the United States" within the meaning of Revised Statutes 3739. (13 Comp. Dec. 533, 535.)

The narrower interpretation of the word "office" is further indicated by the numerous phrases throughout the civil-service act which refer, for instance, to the "subordinate places, clerks, and officers in the public service" (sec. 6); "the civil service of the United States" (title); "officers of the United States" (sec. 2); "applicants for the public service" (sec. 2); "officer or employee of the United States" (sec. 12, sec. 13); "officer, clerk, or other person in the service of the United States" (sec. 14).

While as an original question it might with plausibility be argued that all persons acting in any way under author-



ity of the United States are "in the service of the United States" within the meaning of that phrase and of the similar phrases used in the act, yet the whole trend of authority has been to distinguish the municipal and Territorial and other purely local officers and employees from the general public service of the United States. The compensation and expenses of the officers and employees of the District government are paid not entirely from the National Treasury, as is the normal case in the public service, but one-half from local taxation. The statute creating the present government of the District provided that "the commissioners herein provided for shall be deemed and taken as officers of such corporation." (20 Stat. 102.) In the cases of *Barnes*, *Woodbury*, and *Roth*, above cited, it was held that the officers and employees of the District were officers and employees of a distinct municipal corporation which was responsible for their negligent acts. A justice of the peace of the District can not recover compensation for his services from the United States, even though the District appropriation for the year is insufficient. (*Bundy v. United States*, 21 C. Cls. 429.) A clerk in the office of the auditor of the District may receive compensation for services rendered as a referee in the Court of Claims, which he could not receive if he were "an officer of the United States," or "a clerk in a Department." (*Donovan v. United States*, 21 C. Cls. 120; 18 Op. 161.) School-teachers employed by the District of Columbia are not within the scope of a statute which provides for the payment of "persons in the service of the United States." (13 Comp. Dec. 262, 264.) The Commissioners of the District are not "persons in the service of the United States" within section 1765, R. S. which prohibits such persons from receiving extra compensation for services rendered to the Interstate Commerce Commission. (MSS. Dec. of the Comp., Oct. 30, 1908.)

It is true that in several States the officers of municipal corporations are either placed directly under the jurisdiction of the State civil-service commission or, by State action, under local commissions created by State statutes, but in no case, so far as I can find, has this been done with-

out words expressly designed to include employees of the municipal corporation.

If these limitations to the scope of the act were less doubtful than they are, I should still be inclined to think that the long-continued administrative practice should be decisive. It appears always to have been considered that the act does not extend to the employees under the local government of the District, and for many years both the Commissioners of the District and the Civil Service Commission have annually requested Congress to extend the act to cover these employees. Congress seems itself to have recognized the inapplicability of the statutes by expressly providing that the medical inspectors of the District should be appointed by competitive examination. (32 Stat. 969.)

The administrative practice has been to the same effect in the analogous case of Territorial employees. These employees have not been regarded as within the service of the United States (11 Comp. Dec. 702), and on July 30, 1910, the Civil Service Commission, acting upon an unreported opinion of the Comptroller of the Treasury, dated July 23, 1910, declined to assume jurisdiction over the appointment of clerks in the office of the secretary of the Territory of Arizona.

Aside from the civil-service act, the only possible source of legal authority for the suggested classification is section 1753 of the Revised Statutes, but that contains substantially the same restrictive phrases and can hardly be construed as of wider scope than the civil-service act. Furthermore, there appears to be no appropriation under which that section, even if otherwise sufficient, could be availed of.

For these reasons, as well as for the reasons stated in the opinion of Mr. Attorney General Griggs, above referred to, I concur with his conclusion that under the existing laws the classified service of the United States can not be extended to the officers and employees of the District of Columbia.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

## EXPORTATION OF GUN GREASE TO MEXICO.

Gun grease is within the prohibition of the President's proclamation of March 14, 1912, issued pursuant to the joint resolution of the same date, forbidding the exportation of arms or munitions of war to Mexico.

DEPARTMENT OF JUSTICE,  
*May 20, 1912.*

SIR: Replying to yours of the 17th instant in the opinion which I rendered to the President on March 25 (29 Op. 375), concerning the scope of the meaning of the words "arms or munitions of war," after reviewing the authorities, I suggested the following as embracing all that is within the practical purpose of the joint resolution of Congress, approved by the President March 14, 1912, and the proclamation issued by him pursuant thereto on the same date, viz:

"Articles primarily and ordinarily used for military purposes in time of war, such as weapons of every species used for the destruction of life, and projectiles, cartridges, ammunition of all sorts, and other supplies used or useful in connection therewith, including parts used for the repair or manufacture of such arms, and raw material employed in the manufacture of such ammunition \* \* \*."

You now inquire whether gun grease comes within the meaning of the proclamation as so interpreted. Without any further information as to the nature of that article, except that it is a grease prepared expressly for use in connection with guns of some sort, and that it is sought to be exported from the United States into Mexico for use in connection with guns, I should say that it was directly within the definition of "supplies used or useful in connection" with weapons of some species used for the destruction of life, and in that case within the prohibition of the proclamation. I have the honor to be

Yours, respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF STATE.

COMPENSATION FOR ACCIDENT TO WORKMEN.

Where a laborer employed by the United States in the construction of river and harbor work, while off duty, went upon a bin to talk with the man emptying gravel about going home the following Sunday, and in the act of leaving, voluntarily and with no emergency for immediate action, attempted to empty a box of gravel and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment, and compensation therefor is unauthorized under the act of May 30, 1908 (35 Stat. 556).

DEPARTMENT OF JUSTICE,  
*May 22, 1912.*

SIR: I have the honor to reply to your letter of the 19th ultimo requesting my opinion in the matter of the claim for compensation arising under the act of May 30, 1908, chapter 236 (35 Stat. 556), on account of the death of H. G. Simpson, who was employed as a laborer on the river and harbor work at Lock No. 5 of the Kentucky River, and who was killed August 22, 1911.

Sections 1 and 2 of the act of May 30, 1908, provide:

"That when, on or after August first, nineteen hundred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy-yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment, such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided*, That no compensation shall be paid under this act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen

days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor.

"SEC. 2. That if any artisan or laborer so employed shall die during the said year by reason of such injury received in the course of such employment, leaving a widow, or a child or children under sixteen years of age, or a dependent parent, such widow and child or children and dependent parent shall be entitled to receive, in such portions and under such regulations as the Secretary of Commerce and Labor may prescribe, the same amount, for the remainder of the said year, that said artisan or laborer would be entitled to receive as pay if such employee were alive and continued to be employed: *Provided*, That if the widow shall die at any time during the said year her portion of said amount shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any."

The facts of this case as found by you are as follows:

"Decedent, who was off duty at that hour, went up on the bin to talk with the man working there about going home on the following Sunday. As he was in the act of leaving the bin a box of gravel was raised for the purpose of being emptied by the man to whom decedent had been talking. Instead of passing on and allowing the man on duty to empty the box, claimant took hold of it for that purpose, and in so doing he fell overboard and was drowned. The question therefore arises whether the death occurred in the course of the employment, and the answer must be reached from the facts in the case as above stated.

"In the first place, it is admitted that the decedent was employed by the United States, and at the time of the death he was upon the work or premises of the Government; but, in the second place, it is reported that he did not meet with the accident in the course of his employment, because it was not his duty to perform any work at that particular time. The assistant engineer, in his letter before referred to, says that the particular act of the dece-

dent at the time of the accident was not the one usually performed by him during his working hours, but that he had on two or three occasions performed this work, and that the men took turn about in dumping the box. He further says that no emergency existed at the time requiring immediate action, which fact is clear, as the man whose duty it was to dump the box was there ready to perform the work and would have done so had not the decedent intervened."

Simpson, it appears, was unmarried, and compensation is claimed on account of his dependent parents.

As I have said in former opinions, the act of May 30, 1908, is remedial and should be generously construed (28 Op. 254, 258) and the "purpose of the law was not to set in motion an interminable series of technical inquiries, such as would puzzle the minds of learned and profound judges" (27 Op. 346, 354). Under the broadest possible construction of the act, however, I am unable to hold that this case comes within it. Compensation is only authorized when a person employed by the United States as an artisan or laborer on the classes of work specified is injured "in the course of such employment," and it is expressly provided "that no compensation shall be paid under this act where the injury is due to negligence or misconduct of the employee injured."

The accident to Simpson did not occur in the course of his employment, since, according to the facts stated, he was off duty at the time, went up on the bin for his own purposes without direction from anyone in authority, and the service performed by him was wholly unnecessary, as there was another man present whose duty it was to perform the very act which resulted in his death. The fact that the service was one which he was occasionally required to perform when on duty is not sufficient to justify the payment of compensation. The provision "that no compensation shall be paid under this act where the injury is due to negligence or misconduct of the employee injured" forbids such a construction of the statute as will

involve the Government in liability for injuries resulting from such voluntary and unnecessary acts of persons in its employ. I reach this conclusion independent of the fact that the decisions under the English compensation acts, as well as those relating to the common-law liability of the master for injuries to his servant, are also uniformly to the effect that under such circumstances the injury is not to be deemed to have arisen in the course of the workmen's employment, and no liability arises therefor. (*Reed v. Great Western Railway Company*, 99 L. T. R. 781; *Phillips v. Williams*, 4 Butterworth's Workmen's Comp. Cas. 143; *Ellsworth v. Metheney*, 104 Fed. Rep. 119, 121; *Dresser's Employers' Liability*, vol. 1, p. 104; *McDaniel v. Highland Avenue and Belt R. R. Co.*, 90 Ala. 64; *Knox v. Pioneer Coal Co.* (Tenn.), 18 S. W. 255; *McCue v. National Starch Mfg. Co.*, 142 N. Y. 106.)

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

#### TRANSPORTATION OF LETTERS OUTSIDE THE MAIL.

The Erie Railroad Co. has the right under section 184 of the Penal Code (35 Stat. 1124) to transport over its lines, otherwise than in the mail, letters written by the secretary of the Erie Employees' Relief Association, an organization composed of officers and employees of that railroad, to the railroad company, but can not transport letters written by the officers of said relief association to its members.

DEPARTMENT OF JUSTICE,

*May 23, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of May 16, 1912, requesting an opinion upon the following question:

"Whether the Erie Railroad Co. has the right under section 184 of the Penal Code (35 Stat. 1124) to transport over its lines, otherwise than in the mail, letters written by the secretary of the Erie Employees' Relief Associa-

tion, an organization composed of officers and employees of that railroad."

Section 184 of the Penal Code and its predecessor, section 3985, Revised Statutes, have been construed from the point of view of this question by the opinion of Mr. Attorney General Harmon (21 Op. 394), and by my opinion of December 20, 1910 (28 Op. 537); and in these opinions it is fully shown that Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the letters of the carrier itself; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege.

Upon these principles it is apparent that the privilege of free transportation outside the mail does not extend to such of the letters referred to in your question as are not only written by the secretary of the relief association, but addressed to its members, because such letters being neither written by nor addressed to the carrier, are not communications of the carrier itself.

The constitution and by-laws of the Erie Employees' Relief Association show that the association is not a department of the railroad company, but a separate and independent organization, governed by directors of its own, having its own secretary, chosen by its directors, having its own funds and property wholly separate from those of the railroad, and having obligations and liabilities not attached upon the railroad. This being so, it is not material that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself. In this regard the relief association stands in exactly the same case with the class of companies referred to by Mr. Attorney General Harmon in his opinion above cited, such as separate companies operating car lines, railroad hotels, or railroad restaurants; nor does it differ in principle from the case of the railroad association formed to weigh all carload shipments of the constituent



*420 Postal Savings System—Private Banks in Indiana.*

companies, which was passed upon in my opinion of December 20, 1910, above cited.

A different situation is presented by such of the letters referred to in your question as are addressed by the association to the railroad company (or its officers and employees as representing the railroad company) concerning relations between the railroad company and the association. These communications fall within both of the conditions imposed by Congress, because being addressed to the carrier itself, they are its communications within the intention of the statute, as shown by the opinions cited, and being on the subject of the carrier's own relation to the relief association, they relate to the carrier's current business.

I am of opinion therefore, as above stated, that in so far as the letters referred to in your question are written by officers of the relief association to its members, they are not within the exception authorized by Congress; but that in so far as the letters are addressed to the railroad company (or its officers or employees as representing it) they are within the exception authorized by Congress and may be carried free outside the mail.

Very respectfully,

GEORGE W. WICKERSHAM.

THE POSTMASTER GENERAL.

---

POSTAL SAVINGS SYSTEM—PRIVATE BANKS IN INDIANA.

Private banks in Indiana under the legislation of 1907 may become depositories of postal savings funds under section 9 of the act of June 25, 1910 (36 Stat. 816), as construed in the opinion of March 12, 1912 (29 Op. 368).

DEPARTMENT OF JUSTICE,

*May 24, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, in which, alluding to my opinion of March 12, 1912 (29 Op. 368), you ask whether, in the proper application of said opinion, a private bank in Indiana which has complied with the State laws regulating

such banks is eligible to qualify as a depository for postal savings funds under the provisions of section 9 of the postal savings act of June 25, 1910 (36 Stat. 816).

Section 9 of said act provides, in part, "that postal savings funds received under the provisions of this act shall be deposited in solvent banks, whether organized under national or State laws, being subject to national or State supervision and examination," and in the opinion referred to I held that "a bank 'organized under national or State laws' within the meaning of the postal savings act must be a bank which is the creature of statute law" and "should be incorporated or clothed with the essential attributes of a corporation by virtue of legislative sanction."

The law of Indiana at present regulating the business of private banking is the act of 1907. (Burns' Annotated Indiana Statutes of 1908, secs. 3402-3417.) Previously the law governing the subject was the act of 1905. (Burns' Annotated Indiana Statutes of 1905, secs. 2994a-2994j.) This latter act provided that every *partnership, firm, or individual* transacting a banking business within the State should be subject to the provisions of the act. In general, this act merely regulated such business, providing the amount and character of the assets, that they should be paid in, that the names of the owners and the amount of their ownership should be made public, and that the depositors should have a lien on the assets of the bank. But, by section 2994d it was provided that, on compliance with certain conditions, "the State auditor shall \* \* \* issue to such partnership, firm, or individual a certificate \* \* \* authorizing such partnership, firm, or individual to transact a banking business," and, by section 2994j, that "any bank *organized and doing business under the provisions of this act* shall have the right to sue and be sued under the name under which such bank is authorized to transact its business," such name already having been provided for by section 2994c, paragraph 1. It may be doubtful how far banks coming within the operation of this act of 1905 could be said to be "clothed with the essential attributes of a corporation by virtue of legislative sanction" within

the intent of my former opinion, because the act itself has provisions looking both ways. It might be claimed that these banks are really the creatures, not of the statute, but of the common-law right of the individual to engage in banking as in any other business, regulated, where there is a partnership, by the partnership agreement, which is referred to in section 2994c, paragraph 2, as the instrument under which the business is to be conducted, and that the statutes merely added certain minor attributes of a corporation for the purposes of convenience. Individual liability, *in solido*, of the individual banker or bankers is clearly contemplated (sec. 2994c, par. 5; sec. 2994i), and, in spite of section 2994f, it seems that an assignment of a share of an individual partner would work a dissolution (*Needham v. Wright*, 140 Ind. 190; *Rand, Rec., v. Wright*, 141 Ind. 226, which decisions, however, were not dealing with the act of 1905). In *State v. Richcreek*, 167 Ind. 217, 221, the Supreme Court, construing the act of 1905, said:

“The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the State may regulate and restrain the exercise of such right.”

This language seems to imply that, under the act of 1905, private banks in Indiana were the creatures of the common-law right to carry on banking under any agreement which to the parties seemed good, subject only to the right of the State to regulate the business, a right exercised by the act of 1905.

The act of 1907, however, while reenacting the provisions referred to above, of the act of 1905, which seem to make private banks in certain respects the creatures of the legislature, goes considerably further. It confers on private banks the right (and, indeed, makes it their duty), to take title to real estate in their own names, and to dispose of the same in that way (sec. 3403). It provides that the “capital stock” of the bank may be increased or diminished on agreement or petition of its “partners or shareholders holding two-thirds of its capital stock” (*ibid*). The state-

ment to be filed with the State auditor must contain a statement of "the names of the officers who are to manage the business of said bank" (sec. 3404, par. 6). Section 3405 provides that "each individual, partnership, or firm, desiring to transact a banking business in this State *shall issue certificates of stock* to the respective individual or individuals forming said partnership, in an amount equal to the capital of said bank, which certificates of stock shall be deemed and considered the capital stock of said bank." Section 3407, after providing, as did the act of 1905, that there shall be posted in the banking room a printed list of all the owners and parties interested in the bank, has this additional provision: "Should the interest of any member of such partnership or firm, or of an individual doing a banking business under the provisions of this act, change, either by death, devise, sale, or otherwise, then, and in that case, the auditor of State shall be notified of such change, and the printed notice in the room of any such bank as herein provided shall be changed accordingly." By section 3408, which requires reports to the State auditor of the condition of the bank, it is provided, "in no reports filed under this section shall the real or personal property of an individual or individuals owning said bank, except the title is in the bank, be permitted as an asset."

It thus appears that the act of 1907 (1) expressly refers to private banks as organized and doing business under its provisions; (2) provides for a certificate from the State authorizing the transaction of a banking business without which certificates such business can not be transacted; (3) provides for an artificial name in which the bank can sue and be sued and can take title to property; (4) provides for a capital stock to be divided into shares; (5) provides for the management of its affairs, not by its owners, but by certain named officers; (6) abolishes the *delectus personæ*, so that the transfer of a share in the bank shall not work a dissolution.

I am of the opinion, therefore, that some of the most essential attributes of a corporation are conferred on these private banks in Indiana by legislative sanction. Indeed,

the only characteristic remaining to them of noncorporate existence appears to be the unlimited liability of the owners for the debts of the bank. The case is fully as strong for an affirmance of essentially corporate functions as was that of the *Liverpool Insurance Company v. Massachusetts*, 10 Wall. 566, where the Supreme Court held that an English joint-stock association, formed originally by a deed of settlement, whose share owners were individually responsible and which was expressly declared by act of Parliament not to be a corporation, yet had that character within the intent of a Massachusetts statute taxing insurance companies incorporated under the laws of any Government other than one of the United States. The court said (p. 574):

“ \* \* \* the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

“ 1. It has a distinctive and artificial name by which it can make contracts.

“ 2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

“ 3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

“ 4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament which enables it to sue its shareholders and be sued by them.”

All of these corporate characteristics deemed of the essence by the Supreme Court of the United States appear, in substance, to inhere in private banks in Indiana under the legislation of 1907, and I am therefore of the opinion that they may become the depositories of postal savings funds under section 9 of the act of June 25, 1910, as construed in my opinion of March 12, 1912.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

## POSTAL SAVINGS SYSTEM—WILSON TOWNSHIP BONDS.

Certain good road bonds of Wilson Township issued by the board of commissioners of Wilson County, N. C., under authority of law and which are payable out of taxes levied against all the property, both real and personal, contained within the limits of said township without any restrictions or limitations, may be accepted as security for deposits of postal savings funds consistently with section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 816), and with the regulations of the board of trustees.

The sufficiency of any bonds offered as security for the deposit of postal savings funds, even if they fall within the class "public bonds or other securities supported by the taxing power," rests entirely in the uncontrolled discretion of the board of trustees.

## DEPARTMENT OF JUSTICE,

*May 25, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, in which you request my opinion whether certain bonds issued by the board of commissioners of Wilson County, N. C., under an act passed by the general assembly of that State may be accepted as security for deposits of postal savings funds consistently with section 9 of the postal savings act and with the regulations of the board of trustees adopted in the exercise of the discretion given them by said section. You state that the securities were rejected on the ground that they are payable only from the assessments against the property in Wilson Township, which is but a part of Wilson County.

Section 9 of the postal act of June 25, 1910 (36 Stat. 816), provides, in so far as applicable to your inquiry, as follows:

" \* \* \* The board of trustees shall take from such banks such security in public bonds or other securities, supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand."

It thus appears that the sufficiency of any bonds offered as security for the deposit of postal savings funds, even if they fall within the class, "public bonds or other securities supported by the taxing power," rests entirely in the un-

controlled discretion of the board of trustees. As a guide and rule to the exercise of this discretion the board has adopted certain regulations, and I assume that the question upon which you desire my opinion is whether the bonds now tendered fall within the requirements of such regulations. You, therefore, refer me to section 5 of the Regulations for the Guidance of Banks, which provides that:

“Bonds of any city, town, county, or other legally constituted municipality or district in the United States which has been in existence for a period of ten years, and which, for a period of ten years previous, has not defaulted in the payment of any part of either principal or interest of any funded debt authorized to be contracted by it, and whose net funded indebtedness does not exceed 10 per cent of the valuation of its taxable property, to be ascertained by the last preceding valuation for the assessment of taxes, will be received at 75 per cent of their market value, such market value not to be considered as exceeding par.”

This regulation, however, does not seem clearly to prohibit the reception of bonds of a legally constituted county which are payable only from assessments on property in a portion of the county.

In connection with the opinion I rendered you March 2 last in the Portland, Oreg., bond case (29 Op. 335), you submitted to me a memorandum of the Treasurer of the United States in which it was stated that “the regulations of the board of trustees delegate to the Treasurer of the United States, who, under the law, is treasurer of the board of trustees, the authority to pass on the bonds offered by banks as security for postal savings funds,” and, further, that “a public bond supported by the taxing power within the meaning of postal savings act June 25, 1910, has been construed by this office to mean an obligation of a legally constituted political division, whether Government, State, city, county, town, school district, or municipality, issued under proper legislative authority and constituting a proper charge that may be paid out of taxes levied against all the property, both real and personal, that is contained

within the limits of the place that issues the bonds without any restrictions or limitations."

I assume that it is under this regulation that the objection you refer to is made to the bonds in question, and I therefore proceed to consider whether these bonds constitute "a proper charge that may be paid out of taxes levied against all the property, both real and personal, that is contained within the limits of the place that issues the bonds without any restrictions or limitations," and I do not undertake to pass on their validity in any other respect.

The constitution of North Carolina of 1868, after providing, in Article VII, for the election of county officers and prescribing their duties, provided, by section 3 of Article VII:

"It shall be the duty of the commissioners first elected in each county, to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and to report the same to the general assembly before the 1st day of January, 1869."

By section 4 it was provided:

"Upon the approval of the reports provided for in the foregoing section, by the general assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships."

Section 5 provided for the officers of these townships, and section 9 provided that "all taxes levied by any \* \* \* township, shall be uniform and ad valorem, upon all property in the same, except property exempted by this Constitution."

Townships were unknown in North Carolina at the time the constitution of 1868 was ratified, and the experiment proved a failure. (*Wittkowsky v. Commissioners*, 150 N. C. 90.) In 1875 the constitution was amended so as to provide by section 14 of Article VII:

"The general assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions



of this article, and substitute others in their place, except sections \* \* \* 9 \* \* \*.”

Carrying out the power thus bestowed upon it, the general assembly, in 1878, passed the county government act by which the township officers were abolished, and it was provided “that no township have or exercise any corporate powers whatever, unless allowed by act of the general assembly to be exercised under the supervision of the board of county commissioners.” (*Wallace v. Trustees*, 84 N. C. 164, 165; Pell’s Revision 1908, ch. 23, sec. 1318, par. 30.) The result of this constitutional provision and legislation was to leave the townships nonexistent as political bodies, without officers and without corporate power, and to make them entirely dependent on legislative action, which could grant what corporate powers it chose to townships and could designate what officers it chose to exercise such powers, there being no regular township officers ready to hand. Moreover, the townships, when given corporate power for any purpose, were but divisions of the county whose commissioners fixed their boundaries (Pell’s Revision, ch. 23, sec. 1318, pars. 7 and 30), and supervised the exercise of their powers (par. 30, *supra*). In *Brown v. The Commissioners*, 100 N. C. 92, 97, the supreme court of North Carolina, in construing section 14 of Article VII of the constitution, *supra*, said:

“The more reasonable interpretation is, it seems to us, that the purpose was to confer upon the general assembly full power to legislate in respect to the municipal corporations, provided in the article mentioned, \* \* \* that is, power to create and abolish them; to amend, modify, or repeal the laws affecting them, from time to time, as the changing circumstances, the convenience and common good of the people generally, or in particular sections or localities, may require.

\* \* \* \* \*

“Townships are, therefore, within the power and control of the general assembly, just as are counties, cities, towns and other municipal corporations. It may confer

upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose, to promote the prosperity, safety, convenience, health, and common good of the people residing within them, and resorting thither, from time to time. And we can see no good reason why it may not confer such power for a single purpose, as well as many. \* \* \*

In *Wittkowsky v. The Commissioners* (*supra*), where an act authorized certain townships to issue bonds in aid of a certain company and expressly made the commissioners of the county their agents for that purpose, the supreme court, in holding that townships are embraced in the term "county" in the constitution, said (p. 95):

"\* \* \* While townships and other taxing districts are sometimes referred to as *quasi* municipal corporations, they are but territorial sections of counties, upon which, for appropriate purposes, power is conferred to perform functions of government of local application and interest."

By an act passed by the General Assembly of North Carolina in 1885, chapter 342, it was provided, by section 8, that the board of commissioners of Person County might hold an election of the qualified voters of certain townships therein to decide whether said townships should subscribe to the capital stock of a certain railroad, and, if the decision was in favor of subscription, then (by sec. 9), in payment of said subscription, *the board of commissioners of Person County should have power to issue bonds* to an amount not exceeding the sum so authorized to be subscribed and said bonds should indicate on account of what township subscription they were issued and (by sec. 10) said board was authorized to levy a tax for interest and sinking fund on all the property in the township. In *Jones v. The Commissioners*, 107 N. C. 248, 265, in holding these bonds the valid obligations of the township, the supreme court, after stating the law in the same form in which it was laid down in *Brown v. The Commissioners*, added:

"\* \* \* And there is no reason why the statute may not require the county commissioners to order the election,

430 *Postal Savings System—Wilson Township Bonds.*

ascertain the result thereof, issue bonds and levy taxes in the township, as was done in this case. Indeed, such provision was convenient and expedient. The townships are constituent parts of the county organization, and county officers may well be charged with duties and authority in respect to debts they may be allowed by statute to contract. \* \* \*

By chapter 482 of the Private Laws of North Carolina of 1907, section 61, a school district was created within the town of Carthage, an election provided for within such district, and if said election was favorable, the board of commissioners of the town were authorized to issue bonds for the territory to be signed by the mayor of the town, countersigned by the clerk of the board of commissioners, and sealed with the seal of the town.

In *McLeod v. The Commissioners*, 148 N. C. 77, 85, in holding these bonds the obligation of the school district and not of the town, the supreme court said:

“ \* \* \* It is clear to us that the legislature intended to establish a school district within the corporate limits of the town of Carthage and from a part of the territory of the said town for the purposes specified in the act, and that bonds should be issued, *not by the town, but by the corporate authorities of the town*, the board of commissioners, *for and in behalf of the school district* so created by the statute. It was perhaps considered more convenient and less expensive to have the board of commissioners, the treasurer and the tax collector of the town perform the several duties and functions assigned to them than to provide for the appointment or election of officers within the school district for that purpose. We can see no objection to this method of administering the affairs of the district and to the procedure adopted in order to execute the purpose the legislature had in view. \* \* \* ”

In the light of these provisions of the constitution and laws of North Carolina and of these decisions of its supreme court by which it is established, (1) that townships have no corporate authority or officers *proprio vigore*; (2) that in each case an act of the general assembly must

be sought to show what corporate powers are granted and what officers are intrusted with their execution; (3) that townships, even when granted corporate powers, are but constituent parts of the county and are, therefore, normally under the jurisdiction of the county commissioners; (4) that it is an ordinary and judicious expedient to intrust the conduct of an election involving an issue of township bonds, the issuance of said bonds, and the levying of a tax to pay them to the county commissioners; we may turn to an examination of the act (ch. 922 of the Public Laws of 1907) under which the bonds about which you inquire were issued.

Section 1 provides in part—

“SEC. 1. That the board of commissioners of Wilson County be and they are hereby authorized, empowered and directed to submit to a vote of the qualified voters of Wilson Township in said county, within sixty days after the ratification of this act, the question as to whether or not Wilson Township, in Wilson County and State of North Carolina, shall issue bonds in a sum not to exceed one hundred thousand dollars, with interest coupons attached, for the purpose of grading, macadamizing or otherwise permanently improving the public roads of said township; \* \* \*.”

Section 2 provides the method and procedure of the election. Section 4 provides for a road commission of Wilson Township. Section 6 in full is as follows:

“SEC. 6. That in the event a majority of the qualified voters of said township shall vote for good roads at said election and the result of said election shall be declared and recorded as aforesaid, the board of commissioners of Wilson County shall, at the request of the said road commissioners, have prepared bonds in denominations not exceeding one thousand dollars and not less than one hundred dollars, the total amount not to exceed one hundred thousand dollars, which bonds shall bear interest at the rate of five per centum per annum, with interest coupons attached, payable semiannually on the first day of January and on the first day of July of each year during which said bonds

shall run; that the principal of said bonds shall be payable or redeemable thirty years from the date of their issue; said bonds and coupons shall be payable at some bank to be designated by the board of commissioners of Wilson County and named on the face of the said bonds and coupons; that the said bonds shall be in such form as may be prescribed by the board of commissioners of Wilson County and shall be known and styled 'Wilson Township good road bonds'; that the said bonds shall be signed by the chairman of the board of commissioners of Wilson County and countersigned by the clerk of said board; that none of said bonds shall be valid unless and until the seal of Wilson County has been affixed thereto; that the cost and expenses of having said bonds printed and prepared shall be paid by the board of commissioners of Wilson County out of the general road fund of Wilson County and shall be charged to the account of Wilson Township; that when said bonds have been prepared and signed as aforesaid they shall be delivered to the said road commission of Wilson Township by the chairman of the board of commissioners of Wilson County, who shall take and file a receipt for the same; that that political division of Wilson County now known and designated as Wilson Township shall be liable for the payment of the said bonds and coupons, and that no change in the township lines or in the name of said township, by whatever authority made, shall release the territory now comprised within the boundaries of Wilson Township from liability for the payment of the said bonds and coupons according to their tenor; that the holder or holders of said bonds may bring suit on account of the same against the board of commissioners of Wilson County, but if any holder or holders of the said bonds or coupons shall recover judgment in any court of competent jurisdiction against the said board of commissioners of Wilson County on account of said bonds, or on account of any coupon or interest due on the same, that then that political division of Wilson County now known and designated as Wilson Township and embraced in the boundaries of said township, as now established, by what-

ever name the same shall be known at the time of the rendition of said judgment, shall be liable for the said judgment or judgments so obtained, and the board of county commissioners of Wilson County shall levy taxes for the payment of such judgment or judgments or for the payment of the said bonds, coupons, interest, and cost accruing upon the same, upon the property and subjects of taxation within that territory now comprised within the boundaries of Wilson Township; that no other property or subjects of taxation in Wilson County except that contained within the boundaries of Wilson Township, as now established, shall be liable for the payment of the said bonds, coupons, interest or cost or subject to the levy of any taxes for that purpose; that the board of commissioners of Wilson County may bring and maintain any and all actions or suits necessary touching said bonds or in respect thereto to the same extent as if said bonds were issued by them for the whole county of Wilson; that the holders of the said bonds shall have a first lien on any money in the hands of the board of commissioners of Wilson County held by them for the purpose of working the roads of Wilson Township until all interest coupons due have been paid."

Section 7 provides that the road commission of Wilson Township shall have power to sell the bonds. Section 9 provides that the interest on the bonds shall be paid out of the equitable share of Wilson Township in the general road fund of Wilson County and that, in case of such equitable share be not sufficient, the commissioners of Wilson County may levy a tax on all the property and subjects of taxation in Wilson Township to pay said interest. The bonds issued under this act, according to the copy submitted to me, recite that they are issued under the provisions of the said act in order to secure good roads for Wilson Township; they are signed by the chairman of the board of commissioners of Wilson County, but only purpose to bind the county "to the levying and collection of the necessary tax for the prompt payment of the principal and interest of this bond at maturity."

It is clear that the intent of the legislature in the act aforesaid was to make the bonds issued in pursuance of the authority conferred by the act the bonds of Wilson Township, and that the board of commissioners of Wilson County, in conducting the election, issuing the bonds, levying the tax, and doing the other acts imposed upon them by the statute, are merely the agents of the township. The election provided for in the first section is to determine "whether or not Wilson Township \* \* \* shall issue bonds." Only qualified voters of the township vote at the election. The bonds (by sec. 6) are to be denominated "Wilson Township good roads bonds." They are merely to be signed by the chairman of the board of commissioners of the county, and when executed are to be delivered to the road commission of the township (*ibid.*). Wilson Township is to be liable for their payment, and, if judgment be rendered on them against the commissioners, the township shall be liable for said judgment, and a tax shall be levied on the property and subjects of taxation in the township to pay the same. (Sec. 6.) The tax, both by the constitution (Art. VII, sec. 9) and by the act, must be upon *all* the property within the township *ad valorem*.

That these bonds issued under such provisions of law are in fact the obligations of the township and not of the county is determined by *Jones v. Commissioners*, and *McLeod v. Commissioners*, *supra*, the former case, especially, being precisely in point.

I am, therefore, of the opinion that these Wilson Township good roads bonds are "a proper charge that may be paid out of taxes levied against all the property, both real and personal, that is contained within the limits of the place that issues the bonds without any restrictions or limitations," and that, not being the bonds of Wilson County, they are not subject to the objection to which you refer.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

PHILIPPINE ISLANDS—STATUS OF FOREIGN CORPORATIONS.

Foreign corporations may freely engage in industrial pursuits in the Philippine Islands, provided they obtain a license from the Philippine Government for that purpose.

Corporations, domestic and foreign alike, may purchase or lease such amounts of real estate as may be reasonably necessary to enable them to carry out those purposes for which they were created, but are prohibited from conducting the business of buying and selling real estate and, and if they be corporations engaged in agriculture, from owning and controlling over 1.024 hectares of land.

Belgian corporations enjoy the same rights and advantages in the Philippine Islands as American corporations; the only distinction being that the exploration and occupation of mineral lands and the purchase of nonmineral agricultural public land is confined to citizens of the United States and of the Philippine Islands.

DEPARTMENT OF JUSTICE,

*May 27, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, inclosing a translation of a list of questions submitted to your department by the Belgian minister at this capital, relative to the status of foreign corporations in the Philippines, and requesting my opinion on the legal questions involved.

The list of questions submitted by the Belgian minister is as follows:

“ 1. May a Belgian corporation engage in industrial pursuits in the Philippines, and, if occasion offers, purchase and lease land for cultivation or build factories thereon, or can this only be done by an American corporation ?

“ 2. If the first proposition can be carried out, would the Belgian corporation enjoy the same rights and advantages as an American corporation; or would a foreign corporation be subjected to special conditions? What, if any, are those special conditions?

“ 3. If the first proposition is not feasible, that is to say, if it be necessary to organize an American corporation, how could a Belgian group looking into business transactions in the Philippines practically conceive the creation of such an organism ?”



1. A foreign corporation may freely engage in industrial pursuits in the Philippines, provided it obtain a license for that purpose from the chief of the division of archives, patents, copyrights, and trade-marks of the executive bureau. This license is to be obtained, in the case of banks, savings and loan banks, trust corporations, and banking institutions of all kinds, from the secretary of finance and justice; and, in the case of all other foreign corporations, from the secretary of commerce and police. The orders aforesaid can only be obtained upon a statement under oath of the managing agent of the corporation, showing to the satisfaction of the proper secretary that the corporation is solvent and in sound financial condition, and setting forth other facts which are particularized in section 3579 of the Compiled Acts of the Philippine Commission of 1907. A foreign corporation obtaining such a license is, by section 3584, "bound by all laws, rules, and regulations applicable to domestic corporations of the same class, save and except such only as provide for the creation, formation, organization, or dissolution of corporations or such as fix the relations, liabilities, responsibilities, or duties of members, stockholders, or officers of corporations to each other or to the corporation."

In regard to the purchase and lease of land by a foreign corporation, the same restrictions and limitations apply as apply to a Philippine corporation. These are prescribed by section 75 of the organic act of July 1, 1902, and section 3524 (e) of the Compiled Laws of 1907. Under those provisions a corporation, either domestic or foreign, may purchase or lease such amount of real estate as may be reasonably necessary to enable it to carry out those purposes for which it was created, but is prohibited from conducting the business of buying and selling real estate and, if it be a corporation engaged in agriculture, from owning and controlling over 1,024 hectares of land (28 Op. 258; 3 Op. A. G. Philippine Islands, 346; 4 *ibid.* 61).

2. In general, a Belgian corporation would enjoy the same rights and advantages in the Philippines as an American corporation. Indeed, the attorney general of the Philippine Islands has held that a corporation organized

under the laws of the United States does not differ, in so far as the Philippine laws are concerned, from any other foreign corporation (3 Op. A. G. Philippine Islands, 322).

The only provisions of the Philippine laws which make any distinction between corporations organized under the laws of the United States and Belgian corporations are: (1) Sections 21 and 35 of the organic act of July 1, 1902, which confine the exploration and occupation of mineral lands to citizens of the United States or of the Philippine Islands; and (2) section 979 of the Compiled Laws of 1907, which makes the same restriction as to the purchase of nonmineral agricultural public land in the Philippine Islands.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

---

RECLAMATION OF ARID LANDS—FILING OF AGREEMENTS.

Agreements entered into by the States to reclaim arid lands pursuant to section 4 of the act of August 18, 1894 (28 Stat. 422), known as the Carey Act, are not within the purview of sections 3744 and 3745 of the Revised Statutes and hence there is no necessity for filing copies thereof in the Returns Office of the Department of the Interior.

These agreements when executed and approved by the President form a part of the records of the General Land Office and there would seem to be no reason for changing the departmental practice of filing them in that office.

DEPARTMENT OF JUSTICE,

*June 1, 1912.*

SIR: I have the honor to reply to your letter of the 25th ultimo, asking to be advised whether agreements entered into with certain States pursuant to section 4 of the act of August 18, 1894, known as the Carey Act, must be executed and returned to the Returns Office of the Department of the Interior in accordance with sections 3744 and 3745 of the Revised Statutes.

Section 3744 provides:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. \* \* \*."

Section 3745 makes it the duty of the officer executing such a contract to affix to his return thereof an affidavit to the effect that he has no interest in the contract, and that all the papers relating to the contract accompany the return. Section 3746 provides that any officer who makes such a contract and fails or neglects to make return thereof as required by the preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor and punished by fine and imprisonment.

Section 4 of the Carey Act provides (28 Stat. 372, 422):

"SEC. 4. That to aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such

desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert-land law.

“Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

“As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall

be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars."

The purpose of sections 3744, 3745 and 3746 of the Revised Statutes, as stated in the title to the act of June 2, 1862 (12 Stat. 411), is "to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government." This purpose Congress sought to accomplish by requiring "every contract" made by or under the authority of the three heads of Departments mentioned to be in writing, and a copy thereof returned to the Returns Office established in the Department of the Interior, together with all the data with respect to the making of such contracts—bids, offers, proposals, and advertisement—and by making the papers returned open to public inspection.

As held in my opinion of November 8, 1909 (28 Op. 66), with reference to contracts entered into under your authority with certain users of water furnished for irrigation purposes by the Reclamation Service, the mere fact that a contract is not made by advertisement and bids is not sufficient to take it out of the scope of the statute. On the other hand, in my opinion of January 17, 1912 (29 Op. 293), I held that there was nothing in the purpose to be subserved by the statute which required that a contract returned by the Secretary of the Navy should be accompanied by certain plans which were confidential and could not be divulged at the time without detriment to the public interests.

In my opinion, the so-called contract referred to in section 4 of the Carey Act is not within the purview of these sections of the Revised Statutes. Since such an agreement does not bind the State to do anything looking to the reclamation of the lands referred to, it is hardly a contract at all, as that term, properly speaking, is confined to agreements that are obligatory upon the parties. (Pollock, Contracts,

7; Anson, Contracts, 11; Washington, J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 656.) So, until the State acts, the United States would not be bound by the agreement, except for the declaration of Congress that it should be bound. In other words, the agreement is only a pledge by the United States to make a free grant of certain lands to the State upon specified conditions, and a pledge by the State to abide by those conditions *if it chooses to accept the grant*.

It appears from the regulations issued by your Department for the purpose of carrying the Carey Act into effect that these agreements are made and executed in writing, and that the approval of the President is also indorsed thereon in writing. I understand that when executed and approved they form a part of the records of the General Land Office, where it would seem they naturally belong. There appears to be no real necessity therefore for filing a copy thereof in the Returns Office.

You say that these agreements have never been regarded by your predecessors as falling within the purview of sections 3744-3746, "because of the fact that such contracts involve neither the present nor future expenditure of moneys by or on behalf of the United States or involve any claim against it, but simply constitute an agreement by the States to reclaim arid lands in a manner very analogous to the undertaking of an individual under the desert-land laws of March 3, 1877 (19 Stat. 377), and March 3, 1891 (26 Stat. 1095)." You also say that "the requirement that such contract or agreement must be approved by the President of the United States seems to have been held sufficient of itself to take the matter out of the purview of said sections of the Revised Statutes."

Whether or not they are to be regarded as contracts, I do not think such agreements fall within the purpose or scope of the Returns Act. The fact that they may come within the letter of the statute is not sufficient to bring them within its scope. (*Church of the Holy Trinity v. United States*, 143 U. S. 457.) So, in *Dartmouth College v. Woodward* (4 Wheat. 518, 627), Chief Justice Marshall,

delivering the opinion of the court, held that the word "contract," as used in the constitutional provision prohibiting a State from passing any law impairing the obligation of contracts, should not be construed to include marriage contracts, but should be confined to cases within the mischief which that provision was intended to remedy.

The Carey Act agreements are merely a method of effectuating a free grant of public land, are necessarily matters of public record in the General Land Office, and, under the circumstances, do not lend themselves to the opportunity of fraud which the Returns Act was designed to prevent. I see no reason, therefore, for changing the practice of your Department in respect to the execution and return of these agreements.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

---

PHILIPPINE ISLANDS—IMPORTATION OF GOODS FOR THE  
USE OF THE ARMY.

Goods imported into the Philippine Islands for the use of the Army of the United States are not subject to the stamp tax imposed by section 284 of act No. 355 of the Philippine Commission as amended, as it is beyond the competency of the Philippine Government to levy a tax on articles imported for the use of the United States Government.

DEPARTMENT OF JUSTICE,

*June 8, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 21st ultimo, in which you refer me to section 284 of act No. 355 of the Philippine Commission as amended (section 1660 of the Compiled Acts of the Philippine Commission of 1907), and request my opinion on the legality of the said law in so far as regards its application to original import entries on goods belonging to the United States and imported into the islands for the use of the United States Army.

Said act No. 355, enacted February 6, 1902, is entitled "An act to constitute the Customs Service of the Philippine Archipelago and to provide for the administration thereof." It establishes (section 2) "an executive branch to be known as the Customs Service," and provides (section 3) that its general duties, powers, and jurisdiction shall embrace, *inter alia*:

"6. The collection or securing of the lawful revenue from importations of dutiable merchandise and from the exportation of dutiable merchandise and from tonnage dues, wharf charges, and such others as may, from time to time, be duly established.

\* \* \* \* \*

"8. The collection of the duties, dues, fees, fines, and penalties, accruing under the laws relating to customs, navigation, and commerce, by sea."

After numerous sections providing for an executive organization, for documenting vessels, for entry of vessels, for landing of cargoes, for clearance of vessels, for coastwise trade, for entry of imported merchandise, for examination and appraisal of merchandise, for the liquidation of duties, for bonded warehouses, for transportation in bond, for withdrawals from bond, Chapter XXII of the act, under the title "Stamps," provides, as amended:

"SEC. 284. The following papers shall not be issued, received, granted, or in any manner recognized by any customs officer unless there shall be affixed thereto a lawful customs stamp or stamps of the Philippine Islands, representing the value in Philippine currency as follows:

|                                                                          |        |
|--------------------------------------------------------------------------|--------|
| For each foreign clearance.....                                          | ₱4. 00 |
| For each foreign entrance.....                                           | 4. 00  |
| For each coastwise clearance (to be charged<br>at ports of entry only) : |        |
| For vessels up to 75 tons, net.....                                      | . 40   |
| For vessels from 75 to 125 tons, net....                                 | 1. 00  |
| For vessels from 125 to 200 tons, net....                                | 2. 00  |
| For vessels from 200 to 300 tons, net....                                | 3. 00  |
| For vessels from 300 tons, net, and up-<br>ward.....                     | 4. 00  |



For each inward coastwise manifest (to be charged at ports of entry only) :

|                                                                                                             |         |
|-------------------------------------------------------------------------------------------------------------|---------|
| For vessels up to 75 tons, net-----                                                                         | ₱0. 40  |
| For vessels from 75 to 125 tons, net----                                                                    | 1. 00   |
| For vessels from 125 to 200 tons, net----                                                                   | 2. 00   |
| For vessels from 200 to 300 tons, net----                                                                   | 3. 00   |
| For vessels from 300 tons, net, and upward-----                                                             | 4. 00   |
| For each bill of health-----                                                                                | 1. 00   |
| For each outward foreign passenger list----                                                                 | 1. 00   |
| For each original export entry exceeding ₱50 in value-----                                                  | 1. 00   |
| For each original import entry exceeding ₱50 in value-----                                                  | 1. 00   |
| For each original withdrawal entry-----                                                                     | . 40    |
| For each entry for immediate transportation in bond -----                                                   | 1. 00   |
| For each original free entry, except free entries of stores for Government use, exceeding ₱20 in value----- | . 40    |
| For each original certificate-----                                                                          | 1. 00   |
| For each original bond -----                                                                                | 1. 00   |
| For each copy of official document-----                                                                     | 1. 00 " |

The original act had the following addition to section 284:

“Until due provision can be made for printing a supply of customs stamps, the insular collector is authorized to make requisition upon the collector of internal revenue of these islands for a sufficient number of internal-revenue stamps, which shall first be stamped across their face with the word “Customs,” and then kept for sale by customs officers for use in compliance with the provisions of this section. The funds accruing from the sale of the internal-revenue stamps so used and sold for customs purposes, and from the sale of all customs stamps, shall be regularly deposited as customs collections. These stamps shall be in lieu of the internal-revenue stamps heretofore used on the above-mentioned customs documents.”

But this provision has been dropped from the act evidently because the necessity for it no longer exists.

It is under the provision, *supra*, "for each original import entry exceeding ₱50 in value, ₱1.00," that the payment now in question is demanded for the entry of United States goods for the use of the Army of the United States.

With your letter you inclose a copy of an opinion by the attorney general of the Philippine Islands holding, first, that the above charge is not a "tax," but is merely a reimbursement for services performed; second, that, if it be a "tax," it is, nevertheless, within the competency of the Philippine Commission, even in its application to property of the United States imported for Government purposes. I have given the opinion of the attorney general of the Philippine Islands that very careful consideration to which it is justly entitled, and I regret to say that I am unable to concur with it in either of its holdings.

1. I have already held in the case of the President's Automobile (28 Op. 604, 608) that, if the payments demanded be merely fees intended to cover the expenses attendant upon an execution of the laws, they do not come within the rule forbidding taxation of Federal property or agencies. Whether such payments are a tax or are merely an expense-covering charge is a question upon which the opinion of the attorney general of the Philippine Islands is entitled to great respect, and especially so since there does not appear to be any decision of the supreme court of the islands construing this portion of the act. Nevertheless, it is impossible to escape the conclusion that what is provided for in said section 284 is a stamp tax pure and simple. It is contained in an act providing the machinery and prescribing the rules for the collection of customs dues. Its schedule of charges does not seem to vary according to or be measured by the amount of trouble or labor involved in issuing the papers concerned, but, on the contrary, wherever comparison is possible it seems to be based on quantities, as a tax naturally would be. Thus the clearance charges vary with the tonnage of the vessels, as do the charges for inward coastwise manifests. The charges for entries, both export, import, and free, are based on a minimum valuation, though the trouble and labor involved can not be dependent on such a circumstance. The

clause contained in the original act in regard to the temporary use of internal-revenue stamps (which, though repealed, may still be considered in arriving at the purpose of the legislation), which provides that the funds accruing from the sale of all customs stamps shall be regularly deposited as customs collections, shows that the commission did not understand that the revenues from these stamps differed from any other customs revenues. A reading of the whole act, with a consideration of the position of this chapter on "Stamps" in the general scheme, and its relation to the other provisions of the act, can not fail to convince the mind that (to use the language of the Supreme Court of the United States in *Nicol v. Ames*, 173 U. S. 509, 519), "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility" of doing commercial business at the various ports in the Philippine Islands.

The only argument advanced by the attorney general of the Philippine Islands to show that these payments are expense-covering charges and not taxes is that the provisions of the original section 284 of act No. 355 are "subject to the exemptions prescribed by section one hundred and thirty-five of this act"; that said section 135 divided vessels engaged in the coastwise trade into two classes, those engaged in the general trade of the archipelago, and those small craft trading only within a particular section of the islands; and that the latter class are not "required to pay fees prescribed by chapter twenty-two of this act," which is section 284, *supra*. It is, apparently, the word "fees" which seems important, if not decisive, to the attorney general of the Philippines. But the substance of the thing and not the name given is what determines the question, tax or no tax (28 Op. 604, 607, 610, and cases there cited). And, in the very instance referred to, the fact that vessels engaged generally in the coasting trade must purchase stamps, while small craft making point-to-point voyages need not, shows that it is a tax we are dealing with, since the labor of making out papers, etc., would be the same in both cases, but the reason for levying the tax evidently would not.

2. It is, of course, admitted by the attorney general of the Philippines that a State can not tax the property or agencies of the United States, but he makes an interesting distinction between the position, relative to the United States, of a State and that of the Philippine Islands. He says:

“ \* \* \* such limitation is not applicable to the government of the Philippine Islands, as the relations between the Philippine Government and the Federal Government are wholly different from those existing between the latter and the State Governments. The legislative authority of the States is not a grant of powers to the States, but is derived from the people, and is only limited by those powers conferred by the States upon the Federal Government by the Constitution; and ‘where powers are conferred upon the General Government, the exercise of the same powers by the States is impliedly prohibited, wherever the intent of the grant to the National Government would be defeated by such exercise. On this ground it is held that the States can not tax the agencies or loans of the General Government;’ \* \* \* (Cooley’s Const. Limit., 6th Ed., 28). The legislative authority of the Philippine Government resides primarily in Congress, which has granted legislative power to the Philippine Government in general terms, subject to specific limitations, and such legislative power is exercised by the Philippine Government in its capacity as the representative of Congress, which has reserved the power to annul such legislative acts. No questions of supremacy between two governments is involved; therefore, there would appear to be no limitation upon the power of the Philippine Government to require customs stamps to be affixed by the Federal Government, as the Philippine Commission or legislature, in requiring such customs stamps to be affixed, acts as a legislative agency to whom Congress has delegated the exercise of legislative powers in the Philippine Islands as territory belonging to the United States.”

The principle which forbids one State to tax the property or agencies of another is thus forcibly stated by Mr.

Justice Field in *Wisconsin Central Railroad Company v. Price County*, 133 U. S. 496, 504:

“It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State’s discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the National Government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to ‘dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’ And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise.”

It is too clear to require elaboration that every word of this statement applies, *a fortiori*, to taxation of property or agencies of the United States Government by a derivative sovereignty like the government of the Philippine Islands. But the attorney general of the Philippines, as the quotation from his opinion given above shows, finds in this very derivative character of the Philippine Government the reason why the general rules governing this subject should not be applied. He starts with the premise that Congress itself can tax the property of the United States Government or not, as it pleases; which, of course, is true, though an intent on the part of Congress to tax such property ought never to be presumed, as it is evidently an idle thing for the Government to tax its own property. He then states that Congress has granted its taxing power, without exempting property of the United States, to the Philippine

Government, subject to the power of Congress to annul any legislation; that, in the exercise of this power, the Philippine Government has passed a taxing act which, by its terms, covers property of the United States, and this act Congress has not annulled, thereby making the act its own and making the situation no different from what it would be had Congress itself passed an act taxing property of the United States. This, in my judgment, is to take an imperfect view of the situation. Congress has not granted to the Philippines the same power of taxation possessed by itself. The organic act of July 1, 1902, after ratifying the establishment of the Philippine Commission with the powers conferred upon it by the President, and after confirming the creation and authority of the governor of the islands, merely provides that "until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided." That is, Congress granted powers of local government to the islands, but that government was subject to the inherent limitation of all governments, namely, that its taxing power could not extend to subjects beyond its jurisdiction. It was not granted power to tax property in the United States, though no such limitation is expressly mentioned, and, *aequo ratione*, it could not tax the property or agencies of the very government which was the source of its power.

The power of taxation is a sovereign power. If one government may tax another, the former necessarily is sovereign over the latter. The States and the Federal Government both have sovereign concurrent powers of taxation over the same subjects; yet neither can tax the property or agencies of the other, for that would imply that one was sovereign over the other within the latter's proper sphere, which is not the case. How unreasonable, then, to suppose that a mere grant of power of local government by a dominant sovereign to a derivative, local sovereignty could carry with it a power to tax the dominant sovereign itself, and thus make the creature greater than the creator. The fact that Congress has not annulled the legislation in question is unimportant, and would still be so if the act had in

terms professed to tax property of the United States. The power to annul is only reserved for acts of whose policy Congress does not approve. But *ultra vires* acts do not need annulment, since they have no initial force or validity at all, not coming within the grant made by the organic act. And, in this particular case, the act of the Philippine Commission did not purport to tax United States property, so that there was nothing in the act for Congress to disapprove. It was the application of the act which carried it beyond the lawful powers of the Philippine Government.

Some point is made of the fact that the tariff act of the Philippine Commission of September 17, 1901 (which was ratified by the act of Congress of March 8, 1902, 32 Stat. 54), and the tariff act of Congress of March 3, 1905 (33 Stat. 928, 973), expressly included in their respective free lists supplies imported for the use of the United States Government, while the tariff act passed by Congress August 5, 1909 (36 Stat. 130), contained no such provision. But while the omission of this provision from the latter act might possibly be held to imply an intention on the part of *Congress* to levy duties upon goods imported into the Philippine Islands for the use of the Government of the United States (20 Op. 314) (although upon this point I express no opinion), it is far from implying a grant of authority to the *Philippine Government* to levy a tariff or other tax upon such articles.

I am, therefore, of the opinion that the stamp tax demanded by the Philippine authorities on goods imported into the islands for the use of the Army of the United States is illegal and void, as being beyond the competency of the Philippine Government. Whether an attempt should be made to induce the proper authorities of the Philippine Government to accede to this view, or whether a case should be made and an appeal to the courts taken as provided in chapter 156 of the Compiled Acts of the Philippine Commission, is a matter which may be more properly determined by yourself.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

POSTAL SAVINGS SYSTEM—PUBLIC BUILDING FUND  
BONDS OF OKLAHOMA.

Certain public building bonds issued by the State of Oklahoma and payable out of a trust fund which the State is pledged merely to administer, are not acceptable as security for postal savings funds as they are not supported by the taxing power within the meaning of section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 816).

DEPARTMENT OF JUSTICE,

*June 14, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, in which you state that the Treasurer of the United States has held that public building fund bonds issued by the State of Oklahoma under the act of March 15, 1911, are not acceptable as security for deposits of postal savings funds, on the ground that they are not supported by the taxing power within the meaning of section 9 of the act of June 25, 1910 (36 Stat. 816), and you request my opinion as to the correctness of this ruling.

On August 19, 1893 (28 Stat. 1222, 1229), the President of the United States issued a proclamation opening to settlement certain lands acquired from the Indians, "excepting \* \* \* that section 33 in each township which has not been otherwise reserved or disposed of, is hereby reserved for public buildings," and this reservation was confirmed by Congress in the act of May 4, 1894, ch. 68 (28 Stat. 71).

By the Oklahoma enabling act of June 16, 1906, ch. 3335, section 8 (34 Stat. 267), it was provided:

"Section 8. \* \* \*

"That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the legislature of said State may prescribe."

Upon the same subject the constitution of Oklahoma has the following provisions:

"ARTICLE XI.

"SECTION 1. The State hereby accepts all grants of land and donations of money made by the United States under



the provisions of the enabling act, and any other acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the State is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated.

\* \* \* \* \*

“SEC. 4. All public lands set apart to the State by Congress for charitable, penal, educational, and public building purposes, and all lands taken in lieu thereof, may be sold by the State, under such rules and regulations as the legislature may prescribe, in conformity with the regulations of the enabling act.”

In exercise of the power so granted the Legislature of Oklahoma on March 15, 1911 (Oklahoma Laws 1910-1911, p. 194), passed an act which provided (sec. 1) that all moneys received from the sale of the lands so granted should constitute and be known as the “public building fund;” that “bonds shall be issued against the public building fund” (sec. 2), and, by section 9, that:

“All bonds and interest thereon, when issued as provided for in this act, shall become payable out of the public building fund arising from the sale or rental of section 33, and lands granted to the State in lieu thereof, until all of said bonds and interest thereon are fully paid. And the good faith of the State is solemnly pledged to administer the trust created by the terms of the enabling act and the constitution of Oklahoma, to apportion and dispose of all lands granted to the State for charitable and penal institutions and public buildings as the legislature may prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply same to the payment of the bonds authorized by this act, and the interest thereon, as the same falls due, and to use such funds, constituting the public building fund, for no other purpose or purposes. All bonds shall be paid in the order in which they are issued \* \* \*.

Very little more is required than the above statement of the provisions of law affecting these public building fund bonds to demonstrate that they are not "supported by the taxing power." They are merely payable out of a trust fund, and the State's liability does not extend beyond the faithful administration of, and accounting for, that fund. It is true that the bonds, according to the sample submitted to me, recites "that the State of Oklahoma hereby acknowledges itself indebted to, and, for value received, promises to pay to the bearer, the sum of one thousand dollars (\$1,000) on the first day of May, A. D. 1926, together with interest thereon from the date hereof until paid;" but this is qualified by the subsequent provisions of the obligation, for in them it is recited that the bond is issued under and by virtue of the act of March 15, 1911; that certain lands had been granted by the United States to the State for public building purposes, and that the State, by section 1, Article XI, of its constitution, had accepted this grant, and by the act of March 15, 1911, had constituted the proceeds of the sale or rental of said lands a "public building fund;" and the bond then pledges the good faith of the State, not to the payment of the obligation absolutely and in any event, but merely to administer the trust created by the enabling act and the constitution of the State and to the application of the fund arising from the sale or rental of the lands to the payment of the bonds authorized by the act. Moreover, even if the direct promise of the State to pay the bond, contained in the opening clause, be held to override the subsequent qualification of that promise contained in its later provisions, it is certain that the bonds can have no greater obligatory force than the act itself gives them, and the act nowhere contains a provision looking to any liability of the State outside of the faithful administration of the fund. I assume, without at this time directly deciding, that if a State contract a lawful obligation which it is morally bound to pay by an exercise of its taxing power if necessary, that obligation is "supported by the taxing power" within the meaning of section 9 of the act of June 25, 1910. If this be not the

proper construction of section 9, then the language can have no application at all to State bonds, since a sovereign State can never be held legally bound to pay its obligations by an exercise of its taxing power. As said in *Bank of Washington v. State of Arkansas* (20 How. 530, 532), "those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State." But, in the case of these Oklahoma public building fund bonds, I am unable to find anything in the act authorizing them which indicates an intention on the part of the legislature to make the State itself liable for their payment. Certain lands were granted by the United States to the State with the purpose that the proceeds of their sale should be used for public buildings. The State accepted the lands and pledged itself to use the proceeds thereof for public building purposes and no other. To carry out this trust, and to convert these lands into money to be used for these purposes, the legislature passed the act of March 15, 1911, which, in effect, did nothing more than provide for the issuance of bonds against the land and pledge the land for their repayment. Reading the enabling act, the constitution of Oklahoma, and the act of March 15, 1911, together, a consistent scheme appears to turn the land into money by the issuance of bonds which would make the grant of the United States immediately available, but no intent can be discovered to expend the money of the State for the payment of the bonds, if the proceeds of the sale of the lands be not sufficient for that purpose.

I desire, of course, not to be understood to reflect in any way whatsoever upon the validity of these bonds, nor upon their value as an investment. They simply do not fulfill the requirements prescribed by Congress in section 9 of the postal savings act.

Respectfully,

GEORGE W. WICKERSHAM.

THE POSTMASTER GENERAL.

DISPOSITION OF RECLAIMED LAND FORMERLY COVERED  
BY MUD LAKE, MINN.

Lands in Minnesota ceded to the United States by the Chippewa Indians which were formerly covered by Mud Lake but are now reclaimed by drainage should be surveyed and disposed of for the benefit of the Indians like any other lands included in the cession which have been reclaimed pursuant to the act of May 20, 1908 (35 Stat. 169), and the drainage laws of the State.

Any patents that may issue for the shore lots should be by appropriate description confined expressly to the land above the meander line.

Public lands beneath the waters of a navigable lake become subject to the disposition of the State wherein they lie upon and by virtue of her admission to the Union; but the question of navigability is a Federal question ultimately determinable by the Supreme Court of the United States, applying the Federal constitution.

The test of navigability is actual or potential utility for the purposes of commerce—Mud Lake considered and held nonnavigable.

Public lands beneath the waters of a nonnavigable lake do not pass to the State by virtue of her admission, but are subject to be disposed of by the United States apart from the surrounding upland.

DEPARTMENT OF JUSTICE,

*June 19, 1912.*

SIR: I have the honor to respond to your request for an opinion regarding the status of lands in Minnesota constituting what was once the bed of Mud Lake. The area in question lies in townships 156 north of ranges 41 and 42 west of the fifth principal meridian, and, according to the township plats, occupies approximately 5,000 acres. Both of these townships were part of the Red Lake Indian Reservation at the time of the admission of the State of Minnesota into the Union (*Minnesota v. Hitchcock*, 185 U. S. 373; *State of Minnesota*, 28 L. D. 374) and constitute a portion of the large body of land which was ceded to the United States by the Chippewa Indians pursuant to the act of January 14, 1889 (25 Stat. 642), commonly called the Nelson Act. (See Ex. Doc. No. 247, 51st Cong., 1st sess.) That act provided that as soon as the cession and relinquishment of the Indian title had been obtained and approved by the President the Commissioner of the General

Land Office should cause the ceded lands "to be surveyed in the manner provided by law for the survey of public lands" (sec. 4); that the lands should thereupon be examined in 40-acre tracts, and classified as "pine lands" or "agricultural lands" according to the presence or absence of pine timber; that the pine lands should be appraised at their actual cash value, not less than a minimum fixed by the statute, and should be disposed of, first, at public sale at not less than the appraised value, and, next, so far as any remained, at private sale, at the appraised value, and that the agricultural lands, so far as they were not allotted or reserved for the future use of the Indians, should be disposed of, to actual settlers only, under the homestead law, each settler being required to pay for the land so taken by him "the sum of one dollar and twenty-five cents for each and every acre," etc. (*ib.*, secs. 4-6). The act also provides (*ib.*, sec. 7) that all money accruing from such disposals of the land, after deducting certain expenses, shall "be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota, as a permanent fund," to be held at interest for 50 years, at the expiration of which period the principal, subject to the right of Congress to use 5 per cent of it to promote civilization and self-support among the Indians, is to be divided among the Indians then *in esse*. Three-fourths of the interest during this trust period is to be paid to the Indians, and the remaining one-fourth devoted exclusively to the establishment and maintenance of a system of free schools for their benefit. Pursuant to the statute the two ceded townships were surveyed in 1892. The lands they contain were classified as agricultural. The shore of the lake was meandered, and the fractional subdivisions thus occasioned were laid out into lots, which border on the meander line throughout its periphery and vary in magnitude from 3.75 to 50.35 acres. The lines of the survey were not extended generally over the lake itself, but in the year 1902 two small islands lying in the lake, one of 2.95 acres in section 18 and one of 1.86 acres in section 19, of township 156 north of range 41 west, were duly surveyed and designated as lots, and this had been accomplished at a time when no

filings had been made upon the shore lots fronting on that half of the lake in which the islands lie.

By the act of June 21, 1906 (34 Stat. 352), the Secretary of the Interior was authorized to cause to be made a drainage survey of the lands ceded by the Chippewa Indians under the Nelson Act which at that time remained unsold and were wet, overflowed, or swampy in character, with a view to determining what portions thereof might be profitably and economically reclaimed by drainage, the number, location, cost, and extent of drainage ditches, canals, or improved natural watercourses required to afford drainage outlets; and whether a sufficient fund for such improvements could be provided by an increase in the price at which such unsold ceded lands should be sold in the future. The Secretary of the Interior was authorized to withdraw from entry the whole or any portion of the ceded lands pending the survey and the drainage operations contemplated, and the act made an appropriation of \$15,000 for the purpose of paying the expenses of the survey, and provided that the amount appropriated should be reimbursable from any funds in the Treasury belonging to the Indians derived from the sale of lands under the Nelson Act. Twenty thousand dollars more of the Indian funds was subsequently appropriated to the same ends (34 Stat. 1033; 35 Stat. 82).

Pursuant to this legislation two drainage surveys were made, one in 1906 (see H. Doc. No. 607, 59th Cong., 2d sess.) and the other in 1907-8 (H. Doc. No. 27, 61st Cong., 1st sess.).

By the act of May 20, 1908 (35 Stat. 169), Congress made all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates had issued, subject to all of the provisions of the laws of the State of Minnesota relating to the drainage of swampy or overflowed lands for agricultural purposes, to the same extent and in the same manner in which lands of a like character held in private ownership were subject. This act also provides that the cost of the drainage works shall be equitably apportioned among all such lands, *viz*, private lands, lands unentered, and lands entered but not patented,

and in effect sets aside the withdrawal order which had been made pursuant to the act of 1906.

It appears from the papers submitted by you that under the drainage laws of the State a canal has actually been constructed through Mud Lake, as a result of which the bed of the lake is now dry land and susceptible of cultivation at little or no preliminary expense.

It also appears that most of the lots surrounding the former lake have been entered as homesteads, pursuant to the Nelson Act, *supra*. Of the lots in township 156 north of range 41 west, lots 2 and 3 of section 16 appear to be vacant, as are also the two islands; the rest appear to be subject to some 11 subsisting entries, 1 of which was initiated as early as November, 1903, and has gone to the point of final certificate, while the others were initiated as late as 1910 and 1911. Of the shore lots in the other township, No. 1 of section 13 alone appears to be vacant, the others having been included in seven entries, which all, with one exception (initiated in 1911), have reached final certificates, having originated at dates ranging from June, 1900, to April, 1905. I am not informed that patents have issued upon any of the final certificates.

The character of the lake and the lands surrounding it, as they were before the canal was constructed, is revealed in the reports accompanying the surveys of 1892 and 1902. Concerning township 156 north of range 41 west, the deputy who made the former survey reported:

"This township is very level. There is no soil anywhere in the township near the surface except peat or decomposed vegetation, which covers the township to the depth of 6 feet. There is some tamarack and spruce in the northern part suitable for fencing. The meadows are covered with heavy grass and will cut 2 tons of hay per acre. Mud Lake has marshy shores lined with willows and tall weeds. The water is about 4 feet deep."

Concerning the other township he reported:

"This township is nearly all meadow, tamarack swamp, or open marsh, and has no land fit for cultivation to speak of. There is good fencing and fuel in the tamarack swamp. The meadows are too rough to mow and the marshes are

covered with water to the depth of 1 or 2 feet. Thief River has low marshy banks and is liable to overflow."

The deputy who surveyed the two islands in 1902 says in his report:

"These islands are low and unfit for agricultural purposes. The west end of each is timbered but most of the large timber is cut; the east end is covered with reeds and willows. \* \* \* Mud Lake is shallow, from 3 to 6 feet in depth, and is almost completely surrounded with swamp. It is 18 miles from the nearest railroad point, Thief River Falls, and is not approachable in summer except by boat. No improvements on the islands and very little in the vicinity of the lake. The lake has a great reputation as a shooting resort."

Further light is shed on this subject by the map and report of the drainage survey of 1906, submitted to Congress by the Secretary of the Interior and found in House Document No. 607, *supra*. That survey embraced a large area lying to the northeast of Thief River Falls, including Mud Lake and the lands surrounding it. The plan evolved contemplated the drainage of 266,750 acres of Government and private land and the improvement of 135,750 acres in addition. The map shows that one of the main canals was projected through the basin of Mud Lake itself, and the report leaves no doubt that the surrounding country was found to be so water-soaked and marshy as to be hardly subject to human occupancy. I quote as follows:

"In the area surveyed many thousands of acres have been patented, and occasionally it has been possible to raise a crop. But for much of every year the land is so soaked in water as to be unfit for cultivation.

"At certain seasons the people are entirely isolated on account of the impassability of the country surrounding them and they have been reduced to dire poverty by their inability to secure outlets for such ditches as they have been able to dig. \* \* \*

"The conditions governing the relation between run-off of streams and precipitation are unusual in the region under consideration. Not only is the relief exceedingly low, but



the underlying stratum of impervious clay is covered by a layer of peat, often several feet thick, which, acting as a huge sponge, retains the rainfall indefinitely, permitting the run-off to occur largely as ground water and at a quite uniform rate throughout the year."

It does not appear that the lake ever subserved any human purpose beyond floating the canoes of hunters. It may or may not have possessed sufficient uniformity of depth to permit of its navigation by boats of somewhat greater draft in the prosecution of more serious pursuits, but the fact is patent that no occasion ever arose to test its possibilities as a useful avenue of commerce.

Upon this state of facts the question is presented whether and to what extent the lands formerly covered by the lake, but now reclaimed by drainage, are subject to disposition by the United States for the benefit of the Indians. The inquiry naturally divides itself into two branches, viz: (1) Did the title pass to the State of Minnesota at the time of her admission into the Union? (2) If not, should the lands constituting the lake bottom be surveyed and sold for the benefit of the Indians, or must they go gratuitously to those persons who acquire title to the riparian lots?

1. In dealing with the rights of the State, it should be observed *in limine*, that she is making no claim, and without doubt could sustain none, by virtue of the swamp-land act. (*Red Lake Reservation*, 22 L. D. 388.) The suggestion of State ownership proceeds from the theory that this was a navigable lake. The general principle is thoroughly established that the land beneath navigable waters, whether marine or inland, belongs to the State within whose jurisdiction the waters are situate. Such was the dominion inherited by the original States from the Crown of England, and such also, it has been repeatedly held, must be the prerogative of all States subsequently created in virtue of that sovereign equality which the Constitution insures. It has been said that such lands are, in the first instance, held by the United States in trust for the State whose territorial jurisdiction will embrace them. (*Shively v. Bowlby*, 152 U. S. 1, 49; *Weber v. Harbor Com'rs.*, 18 Wall 57, 65,

66; *Knight v. Land Ass'n.*, 142 U. S. 161, 183.) But it is not to be conceded that the implied constitutional duty to preserve such lands intact for the future State is so far paramount and inflexible that Congress may not in its discretion dispose of them in promotion of other constitutional objects while the lands remain subject to the absolute sovereignty as well as the proprietary dominion of the General Government. Certain dicta to the contrary in early cases are explained as such in *Shively v. Bowlby*, *supra*, where the court, after a thorough review of the entire subject, laid down the true doctrine very clearly in the following language:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition. \* \* \*

"We can not doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory" (p. 48).

The same principle would be equally, and indeed more evidently, applicable to lands beneath a navigable lake. As suggested by the learned First Assistant Secretary of the Interior, Mud Lake (even though navigable) might lawfully have been withheld from the State of Minnesota by an appropriate reservation for the Indians made prior to the admission of the State into the Union. (*United States v. Winans*, 198 U. S. 371.) Whether the acts constituting the reservation in the present case are so definite as to evince an intention to exclude the State may not be so clear (*Ward v. Race Horse*, 163 U. S. 504), but need not be decided, since I am obliged to conclude upon the facts as

here presented that the lake was not navigable in the sense required for the application of the constitutional rule of State equality.

The rule which reserves to the Crown in England and to the States in this country the control of the navigable waters, and the land beneath them and their shores, rests fundamentally upon the proposition "that the public authorities ought to have entire control of the great passages of commerce and navigation, to be exercised for the public advantage and convenience." (*Barney v. Keokuk*, 94 U. S. 324, 338.) Consistently with this reason, navigable waters in England are confined by the common law to tide waters, because there the waters of that description include practically all that are of serious commercial utility. The same conditions do not exist in this country. Our great inland rivers and lakes, though far above the ebb and flow of the tide, are of immense importance to the public as ways of commerce, and consequently the English test has been abandoned simply because its application is opposed by the underlying reason (namely, the convenience and necessity of the public) for subjecting any water, tidal or nontidal, to a public interest and control. (*The Genesee Chief*, 12 How. 443; *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 20 Wall. 430, 441; *Barney v. Keokuk*, 94 U. S. 324; *Illinois Central Railroad v. Illinois*, 146 U. S. 387, 435; *Leovy v. United States*, 177 U. S. 621, 630.) In *The Genesee Chief*, *supra*, wherein it was held that the admiralty jurisdiction exists over the Great Lakes, notwithstanding their virtual freedom from tides, the court said (p. 454):

"In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tidewater. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tidewater and navigable water are synony-

mous terms, and tidewater, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

\* \* \* \* \*

“It is evident that a definition that would at this day limit public rivers in this country to tidewater rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tidewater, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States (p. 457).”

In *Illinois Central Railroad v. Illinois*, *supra*, the court, after referring to *The Genesee Chief*, observed (p. 436):

“When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tidewaters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tidewaters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is

founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidewaters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

In *The Daniel Ball*, *supra*, it was declared (p. 563):

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In *The Montello*, *supra*, it was said (p. 441):

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

"(P. 442:) It is not, however, as Chief Justice Shaw said (21 Pickering, 344): 'Every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful for some purpose of trade or agriculture.'"

Also in *Harrison v. Fite* (148 Fed., 781), a case involving the status of "Little River" in Arkansas, the Court of Appeals for the Eighth Circuit remarked (p. 784):

"Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is

sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation”.

Citing *Toledo Liberal Shooting Co. v. Erie Shooting Club* (90 Fed., 680), and many causes from State courts.

Since it is the actual or potential usefulness of the waters for the purposes of public commerce which must determine whether or not they are *publici juris*, the conclusion seems inevitable that Mud Lake was not, in legal contemplation, a navigable body of water. Even assuming, what the facts presented will hardly justify, that it was uniformly deep enough to permit the safe and convenient passage over considerable distances of boats sufficiently large to be employed in a small way for the transportation of passengers and freight, the fact remains that, owing to the nature of the environment, there was never any occasion for such traffic to exist upon its waters. Its chief interest to society lay in its relation to physical conditions which prevented the development of the surrounding region, and the removal of which involved the destruction of the lake itself. The mind labors in difficulty to conceive the circumstances under which this lake or pond might ever have become of serious commercial value to the public.

The supreme court of Minnesota appears to have extended the definition of “navigable waters” to include lakes not adapted to commercial navigation and susceptible of no use by the public save for pleasure boating, bathing, skating, etc. (*Lamprey v. State*, 52 Minn., 181, 18 L. R. A., 670.) This view is not only at variance with the views generally adopted by the courts of the several States (see *Harrison v. Fite*, *supra*), but extends most obviously beyond the limit of the rule as laid down by the Federal Supreme Court in the decisions cited above. Without questioning the well-established proposition that it lies with each State to determine for herself the extent to which she will exercise her sovereign prerogative over navigable waters and the lands beneath them, or resign to the riparian proprietors or others the property and privileges which

rightfully she might retain for the public, it must be held that the question whether waters are or are not navigable is in the first instance a Federal question, the authoritative and final answer to which can only be given by the Supreme Court of the United States, interpreting and applying the Federal Constitution. The basis of determination is the constitutional equality of States. The particular application of this principle consists in allowing to the non-original States no more and no less than the rights which the original States had inherited from the Crown of England when the Federal Government was formed. Those rights in turn are measured by the rule of the common law as adapted to this country. Thus the rule is to be read and applied as though it were a part of the Constitution itself, and necessarily there can be but one rule. To admit a multiplicity of rules would be to violate the principle of equality under pretense of observing it, and to permit the various States to define the rule for themselves would be in effect to make them the arbiters of their respective prerogatives under the Constitution, and submit the property rights of the United States to State determination.

2. By the law of Minnesota a conveyance of land bounded on a nonnavigable lake carries title to the submerged land. Where the upland is held by several owners, the limits of their holdings are determined by lines drawn from the points where their side lines intersect the shore or meander line to the center of the lake. (*Lamprey v. State*, 52 Minn., 181; *Hanson v. Rice*, 88 *ib.*, 273; *Skell v. Matteson*, 81 *ib.*, 38; *Sherwin v. Bitzer*, 97 *ib.*, 252.)

Since conveyances by the United States are in this regard to be interpreted according to the law of the State (*Hardin v. Jordan*, 140 U. S., 371; *Mitchell v. Smale*, *ib.*, 406; *Hardin v. Shedd*, 190 U. S., 508; *Kean v. Canal Co.*, *ib.*, 452), patents for lots bounded upon Mud Lake (were it a subsisting body of water) would doubtless convey title to the land beneath the water. It is well settled that with certain important exceptions a meander line is not a boundary, and that where lots are patented according to a plat which exhibits them as bordering on a pond or non-navigable lake the water will be taken as the true boundary,

notwithstanding the field notes may show that a meander was run and adopted in determining the area of the lots. (See cases last cited.) These authorities, however, do not intimate that the Government is bereft of the right, enjoyed by every private owner, to limit its conveyances to the upland if it sees fit to do so. On the contrary, it will be found upon examination that they, and others which might be cited if necessary, expressly recognize that right and apply the State law merely as a convenient rule for interpreting patents in common with other conveyances. I know of no act of Congress which requires the Land Department either to abstain from extending the public surveys over lands covered by nonnavigable waters or to dispose of such lands without compensation as mere appurtenances to the surrounding uplands. From my study of the subject I conclude that the practice of excluding such lands from the surveys by meander lines has been based entirely on convenience and that the department long supposed that patents for the upland lots according to the plats resulting from such surveys would be consistent with the retention by the Government of the lands beyond the meanders, as its conduct in afterwards surveying and attempting to dispose of them in not a few instances suffices to prove. In *Kean v. Canal Co.*, *supra*, at page 459, the court said:

“It would seem, to be sure, that the settled understanding of the Land Department has been that in cases like the present the meander line marked the limit of the grant.”

In the dissenting opinion, which deals with the matter quite exhaustively, it is said (p. 494):

“Without presently developing this subject further, I append in the margin a reference to acts of Congress, rules of the Land Department governing surveys, and reports of the executive officers charged with the survey and disposition of the public domain, which beyond peradventure show that from the very beginning of the Government up to the decision in *Hardin v. Jordan*, the general practice was to treat the land under nonnavigable waters as the property of the United States, and to survey and sell the same as part of the public domain.



I am of opinion that the Government rests under an obligation to deal with the reclaimed area in such wise as to realize for the Indians at least the stipulated price per acre—a conclusion which acquires added strength from the action of Congress in appropriating the Indians' money to carry out the original drainage survey.

You are advised, therefore, that the land should be surveyed and disposed of for the benefit of the Indians like any other lands included in the cession which have been reclaimed pursuant to the act of May 20, 1908, *supra*, and the drainage laws of the State. In this connection you are further advised that any patents that may issue for the shore lots should be by appropriate description confined expressly to the land above the meander line.

Respectfully,

ERNEST KNAEBEL,

*Assistant Attorney General.*

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

---

PORTO RICO—LEGALITY OF BOND ISSUE.

The municipality of Ponce, P. R., may lawfully issue bonds for the purpose of paying an indebtedness to the insular government and for the purchase of land and construction of a pier, as the power to issue bonds of this general character has been granted to that municipality by Congress and the legislative assembly of Porto Rico.

It is essential to the validity of said bonds that the provisions of the act of the legislative assembly of Porto Rico of January 31, 1901, authorizing and regulating the issuance of bonds by the cities of Porto Rico, be substantially complied with.

These bonds are made payable, principal and interest, in Porto Rico, and in case proper notice is given by the holder thereof the place of payment may be transferred to New York City. They are transferable in Porto Rico only.

The form of the bond must be approved by the executive council of Porto Rico, as provided by section 9 of the act of January 31, 1901.

DEPARTMENT OF JUSTICE,

*June 26, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, inclosing a copy of an original

and supplementary ordinance adopted by the municipality of Ponce, Porto Rico, and approved by the executive council and the governor of Porto Rico, authorizing a \$390,000 bond issue for the purpose of paying off an indebtedness to the insular government of \$35,200, and for the purchase of land and construction of a pier; and a copy of a franchise granted the municipality by the executive council of the right to build, maintain, and operate a pier; together with a copy of the bond proposed to be issued by the municipality under the authority aforesaid. Upon these papers you request my opinion as to the legality of this proposed issue of bonds, whether the bonds may be made payable both as to interest and principal and transferable in the United States as well as in Porto Rico, and as to the form of the bonds.

The Porto Rican organic act of April 12, 1900, c. 191 (31 Stat. 77), provides, by section 7, that citizens of Porto Rico and citizens of the United States residing therein "shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such." Section 27 provides, in part, "that all local legislative powers hereby granted shall be vested in a legislative assembly which shall consist of two houses." Section 32 provides, in part:

"SEC. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges, or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor \* \* \*."

Section 38 provides:

"SEC. 38. That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assess-

ments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit \* \* \*: *Provided, however, That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property.*”

By an act of the legislative assembly of Porto Rico of January 31, 1901, to authorize and regulate the issuance of bonds by the cities of Porto Rico (laws of 1901, p. 150), it was provided by section 4 that the council of any city having a population of more than 10,000 by the census of 1899–1900 should have “the power to issue bonds, with coupons attached thereto, on the credit of the city to an amount not exceeding said seven per cent of the aggregate tax valuation of its property, for the purpose of constructing water works, sewers, public buildings, bridges, grading and opening streets, or other necessary public improvements, or for the purpose of funding and taking up and making payment of the floating indebtedness and liabilities of such city.” Section 5 provides:

“SEC. 5. Such bonds must be in such form as the city council directs and be of the denominations of five hundred and one thousand dollars. The bonds and the coupons attached must be signed by the mayor and the secretary of the city council, and the date of the issue of each must be registered by the secretary. The bonds must be sold at not less than their par value and draw interest at a rate not to exceed six per cent per annum, the interest payable semi-annually.”

By section 7 it is provided that the treasurer of such city shall pay the interest on the bonds upon presentation

at his office of the proper coupons, but that "in case the holder of such bonds gives the mayor notice in writing, that he wishes the bonds so held by him and the interest thereon, to be paid in New York City, then such bonds and coupons are payable in New York City at such bank as is designated by the said council, and all bonds and coupons so paid must be returned to the city council within thirty days, and such bonds must be canceled by the secretary."

Section 8 provides:

"SEC. 8. The bonds shall be redeemable in ten years and payable in twenty years."

Section 9 provides that no such loan shall be valid "until the executive council of Porto Rico shall have first approved of the purpose of the loan, the form of the bond, the rate of interest, and the several other requirements of this act, and of the action of the city proceeding hereunder."

By an act of the legislative assembly of March 10, 1904 (laws of 1904, p. 148), municipalities were authorized to receive advances by way of loans from the insular government, and by an act of March 9, 1910 (laws of 1910, p. 74), this authorization was extended to the sale or assignment of the obligations of the municipalities to the people of Porto Rico and the creation of a special fund to be loaned, as necessity arose, by the latter to the former.

By the municipal code of March 8, 1906 (laws of 1906, p. 107), it was provided, in section 2, that "the inhabitants of any municipality within the meaning of this act are hereby constituted a body politic and corporate, which shall have perpetual succession, may use its own official seal, sue and be sued," and that "they may, in their said corporate capacity, perform such acts in general as may be necessary for the due exercise of their corporate functions as provided by this act, and may also exercise such powers as may be specifically conferred upon them;" and by section 3 Ponce is constituted a municipality of Class I. By section 10 it is provided that "in each municipality there shall be a municipal council in which shall be vested all local legislative powers conferred upon municipalities."

By section 25, as amended March 14, 1907 (laws of 1907, pp. 259, 260), council is given power *inter alia*:

“To construct, maintain, and operate docks, bulkheads, or other harbor improvements, and for that purpose may use so much of the shore front and the approaches thereto belonging to the people of Porto Rico as may be necessary.”

Section 89 provides:

“SEC. 89. Any municipality desiring to borrow money for the purpose of constructing waterworks, sewers, public buildings, bridges, grading and opening streets, and other necessary improvements, shall be authorized to do so and to issue bonds for that purpose, upon complying with the provisions of an act entitled ‘An act to authorize and regulate the issuance of bonds by the citizens of Porto Rico,’ approved January 31, 1901, which act is hereby continued in force and made applicable to all of the municipalities mentioned in this act.”

By section 90 advances from the insular government are again authorized.

Finally, by an act approved September 3, 1910 (laws of 1910–11, p. 40), bonds issued by municipalities in favor of the people of Porto Rico are exempted from taxation, and the faith of the people of Porto Rico is pledged to their payment.

It is by virtue of the above provisions of the organic act and of the acts of the legislative assembly of Porto Rico that the council of the municipality of Ponce, on the 17th of October, 1911, duly passed an ordinance authorizing the mayor and secretary to borrow from the people of Porto Rico the sum of not to exceed \$390,000, in order to pay off certain previous advances made by the insular government to the municipality, and to provide for the construction of a pier, and authorizing the said officials to issue the bonds of the municipality, payable to the treasurer of Porto Rico, for and on behalf of the people of Porto Rico, or assigns, in the sum aforesaid; and this ordinance was approved by the executive council and by the governor.

It is also stated in your letter that the amount of bonds authorized by the ordinance aforesaid, namely, \$390,000, together with the existing indebtedness of the municipality of Ponce, will not exceed 7 per cent of the aggregate tax valuation of the property of said municipality.

As these bonds are to be issued by a duly constituted municipality for purposes authorized by section 38 of the organic act, by section 4 of the act of January 31, 1901, and by section 89 of the act of March 8, 1906, namely, of funding the floating indebtedness of said municipality and for necessary public improvements (see also sec. 25, municipal code, as amended, *supra*); as they are not in excess of the limitations in the proviso to section 38 of the organic act, and as the ordinance authorizing them has been approved by the executive council of Porto Rico—in short, as the power to issue bonds of this general character has been granted by Congress and the legislative assembly to the municipality of Ponce, it would seem that no objection of a general nature can be made to them. In this broad aspect their validity is sustained by the opinion of my predecessor, Mr. Bonaparte, in 27 Op. 104, and by my opinion in 28 Op. 245. When, however, the particular provisions of these bonds, as authorized by the ordinance, are examined, they appear to be open to serious objection. Section 5 of the act of January 31, 1901, quoted above, expressly provides that the bonds must be “of the denominations of five hundred and one thousand dollars,” and section 8 that the bonds “shall be redeemable in ten years and payable in twenty years.” Section 89 of the municipal code expressly provides that bonds can only be issued by municipalities “upon complying with the provisions” of the act of January 31, 1901, “which act is hereby continued in force and made applicable to all of the municipalities mentioned in this act.” So far as I can discover, the legislative assembly has never repealed or modified this provision. An act approved March 9, 1911 (laws of 1910–11, p. 166), provides that, as incident to the issuing of any bonds, municipalities may provide by ordinance that any public work, the cost of which is to be met by the sale of

bonds, shall be constructed in accordance with plans and specifications approved by the Commissioner of the Interior, "and may further set forth and provide in any such ordinance all such other and further stipulations or details as the executive council may deem advisable or require in any particular case as a condition precedent to the granting of such loan, or advance, or the authorizing of such bond issue;" but this can hardly be meant to modify the general provisions of the municipal code on the subject of municipal obligations. It probably only refers to stipulations covering the form and execution of the contracts of construction.

Although, therefore, the law of Porto Rico requires municipal bonds to be issued in denominations of \$500 and \$1,000, and to be redeemable in 10 years and payable in 20, the ordinance submitted by you authorizes by section 4 bonds of the denomination of \$400, payable in from 3 to 15 years, with no special provision for optional redemption. This variance, it appears, would render the bonds issued in that form entirely invalid. In *Young v. Clarendon Township*, 132 U. S. 340, 346, 347, the Supreme Court of the United States, in holding bonds void without the certificates of the governor which the law required, said:

"\* \* \* In such case the nature of the bonds, their force and effect, their value and character while in the hands of the state treasurer, the rightfulness and sufficiency of their issue, and all kindred questions, must be referred to the statute authorizing them. In this case the statute is the act of 1869. It is the touchstone. Whatever might be the rule in ordinary cases, so far as the act goes, it controls here, being the enabling act; outside of it there was no power, whatever, to issue these bonds. By an unbroken current of decisions by this court and by all other courts, too numerous to mention, it is settled law that a municipality has no power to make a contract of this character, except by legislative permission. It is manifest that, such being the case, the legislature in granting such permission can impose such conditions as it may choose; and even where there is authority to aid a railroad and incur a debt

in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act."

To the same effect are *Wells v. Supervisors*, 102 U. S. 625, 631; *Barnum v. Okolona*, 148 U. S. 393; *Provident Life & Trust Company v. Mercer County*, 170 U. S. 593, 600. *Dillon on Municipal Corporations*, ed. 1911, sec. 889.

I can not regard the provisions of sections 5 and 8 of the act of January 31, 1901, as merely directory, nor speculate as to the motives of the legislature in enacting them. It is enough that they are positive and unambiguous in their terms and are contained in the only act I have been able to find authorizing such bond issues at all. They must, therefore, be substantially complied with. And this applies not only to the points referred to above, but also to the signing of the bonds by those persons who are mayor and secretary of the council of Ponce at the time they are issued (*Coler v. Cleburne*, 131 U. S. 162), and the registering of the date of issue by the secretary (*Anthony v. County of Jasper*, 101 U. S. 693).

In regard to the possibility of making the bonds payable, principal and interest, in the United States as well as in Porto Rico, in the absence of legislative restriction, municipal bonds may be made payable anywhere (*Meyer v. City of Muscatine*, 1 Wall. 384, 391). It is true the ordinance (sec. 4) makes these bonds payable, principal and interest, at the office of the treasurer of Porto Rico at San Juan, but the provisions of section 7 of the act of January 31, 1901, have clearly the effect to transfer the place of payment to New York City as to those bonds whose holder gives the proper notice of his desire to have them so payable. Of course they can not be made or considered payable anywhere else in the United States than in New York.

As to making them transferable in the United States, the ordinance expressly provides (sec. 4) that they shall be transferable on the books of the treasurer of Porto Rico, and the ordinance must be followed.



In *Brenham v. German American Bank*, 144 U. S. 173, 188, the Supreme Court said:

“It is also to be remarked that the ordinance of June 7, 1879, provided that the city should have the right to redeem the bonds ‘at any time after five years from date,’ while each bond on its face states that it is redeemable by the city ‘after the expiration of ten years from date hereof.’ The officers of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption.”

The situation as to the right to make the bonds transferable in the United States is different from that as to the right to make them payable in New York, because the enabling act has no provision on the subject of the transferability of the bonds, so that the terms of the ordinance must control.

I also call your attention to the fact that section 4 of the act of January 31, 1901, evidently contemplates the issuance of coupon bonds. While the power to issue coupon bonds may be deemed to include the power to issue registered bonds (the kind authorized by the ordinance passed by the council of Ponce), yet it seems proper to bring this matter to your notice as an additional evidence that the provisions of the act of January 31, 1901, do not seem to have been followed in the provisions of the said ordinance. It is, of course, possible that the act of January 31, 1901, has been repealed or modified by some later enactment of the legislative assembly of Porto Rico not called to my attention. Unless this be the case, however, in my opinion the provisions of said act should be complied with.

You also request my opinion on the form of the bond submitted by you.

Section 9 of the act of July 31, 1901, expressly provides that the form of the bond must be approved by the executive council, so that it would be manifestly improper for me to express any opinion on this subject.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

POSTAL SAVINGS SYSTEM—SETTLEMENT OF ACCOUNTS  
OF DECEASED DEPOSITORS.

The Postmaster General is authorized to make regulations dispensing with administration proceedings in the settlement of accounts of deceased depositors in the Postal Savings System, provided such regulations be reasonable, adapted to the discovery of truth, and based upon the general legal principles governing the distributions of decedents' estates.

Perhaps it would be well to have the regulations printed in the pass book or otherwise brought to the attention of the depositors, and it would also seem wise, out of abundant caution, to have the regulations adopted by the board of trustees.

DEPARTMENT OF JUSTICE,

*June 26, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, having reference to the settlement of accounts of deceased depositors in the Postal Savings System, and requesting my opinion whether you have authority to dispense with administration proceedings in cases where such proceedings would be a burden and hardship to the relatives of the deceased depositor, and to prescribe an uniform rule for the settlement of the accounts of deceased depositors, without regard to the present practice of accounting officers or the laws of the several States relating to the distribution of personal property.

The postal savings act of June 25, 1910, ch. 386 (36 Stat. 814), provides (sec. 1) that the board of trustees "shall have power to make all necessary and proper regulations for the receipt, transmittal, custody deposit, investment, and repayment of the funds deposited at postal savings depository offices"; that the postal savings depository offices are declared "to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this act and the regulations made in pursuance thereof" (sec. 3); "that any depositor may withdraw the whole or any part of the funds deposited to his or her credit, with the accrued interest, upon demand and under such regulations as the board of trustees may prescribe" (sec. 8); that the Postmaster General "is also authorized to make, and with the approval of the board of trustees to promulgate, and

from time to time to modify or revoke, subject to the approval of said board, such rules and regulations not in conflict with law as he may deem necessary to carry the provisions of this act into effect" (sec. 14). In addition, the act of March 4, 1911, ch. 241 (36 Stat. 1340), provides "that the Postmaster General \* \* \* shall also from time to time make rules and regulations with respect to the deposits in and withdrawal of moneys from postal savings depositories and the issue of pass books or such other devices as he may adopt as evidence of such deposits or withdrawals, and the provisions of the act approved June twenty-fifth, nineteen hundred and ten, are hereby modified accordingly."

I am satisfied that these broad grants of power are ample to justify regulations governing the determination of the proper claimant to the funds of a deceased depositor and the payment thereof to him, provided such regulations be reasonable, adapted to the discovery of the truth, and based upon the general legal principles governing the distribution of decedents' estates. Such regulations would be eminently calculated to carry out the purposes of the law and to make it more efficacious and beneficial. Indeed, they seem to be well-nigh essential.

In *Boske v. Comingore*, 177 U. S. 459, 470, the Supreme Court said, in regard to regulations made by the Secretary of the Treasury, under section 161, Revised Statutes:

"\* \* \* In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

In *Manning's Case*, 6 Lawrence, 1, 13, Comptroller Lawrence said:

“ \* \* \* The payment of claims against the United States is a part of the business of the Treasury Department, and is, therefore, a proper subject for regulations. The Secretary has, by a regulation—which has been quoted in the argument in this case, and has the force of law—provided, that, in cases certified for payment to the Treasury Department ‘by any commission created by Congress, the persons certified by said court or commission as the attorneys of record shall be regarded as such by this Department, and be entitled to receive the drafts in such cases.’ ”

And this regulation prescribing what person, as representing the claimant, should be entitled to payment from the Government was upheld by the comptroller.

To the same general effect is *Savings Bank v. United States*, 16 Ct. Cl. 335, 347, 349.

Such regulations expressly authorized by act of Congress have, when duly promulgated, the force of law. They fix the conditions on which the provisions of the act itself become operative. They delimit the field of the act's operation. In this aspect they are dealt with and sustained in *United States v. Grimaud*, 220 U. S. 506, 517, and a number of the earlier cases on the subject are there examined or cited. Hence regulations validly made under the express authority of the postal savings act may, in so far as the act itself does not otherwise provide, determine the conditions under which the United States will enter into the arrangement therein contemplated, including the persons to whom it will pay the deposit in the case of a depositor's death. The regulation, then, will define the terms and extent of the liability of the United States, and no other liability can be admitted against it, just as by section 3477, Revised Statutes, Congress defined the terms on which the United States will recognize the assignment of a claim against itself. As a rule, of course, on the death of the owner of a chose in action, his legal representative acquires an immediate vested right therein, and that legal representative is determined by the law of the domicile.

But here the regulation affects the right of the depositor before his decease, determines the conditions on which, the time when, the persons to whom, etc., the right shall pass on death, and it is only the right thus limited and defined which survives the death of the depositor.

If the right of succession to the depositor's credit on his decease were derived from his original contract of deposit with the United States, in all probability that right could not be affected by regulations promulgated after the deposit was made, unless the depositor knew of and assented to such regulations (*Kimins v. Savings Bank*, 141 Mass. 33, 36). But the postal savings act makes no provision for payment to any one but the depositor himself. Section 8 provides "that any *depositor* may withdraw the whole or any part of the funds deposited *to his or her credit* \* \* \* upon demand." Evidently the right of any one, other than the depositor, to demand payment of the deposit, as representing the depositor, was left to be governed by regulation. It is significant that in the Senate report on the postal savings bill, in which report the necessity and value of regulations to fill in the details of the act are strongly insisted on, the English regulations are printed in full, and among them is one dispensing with administration on the death of a depositor. (Cong. Rec. 61st Cong., 2nd sess., p. 1265.)

It is clearly settled that there is no vested right to succeed to a person's estate, real or personal, before the decease of the owner. It is equally clear that there is here no contract right to such succession as perhaps would be the case were the deposits payable to the depositor or his legal representatives. Therefore, upon a subject within the legislative power of the Congress of the United States, as I must assume this to be, its enactments and any regulations made pursuant thereto are controlling, and fix the right of representation upon death as to choses in action which owe their whole existence to a statute of the United States.

I am, therefore, of the opinion that such a regulation as you refer to, relating to the payment of the accounts of deceased depositors, and providing a just, speedy, and inex-

pensive method of settling them, would be valid. Perhaps it would be well to have the regulation printed in the pass book or otherwise brought to the notice of the depositor, and it would also seem wise, out of abundant caution, to have the regulation adopted by the board of trustees.

Respectfully,

GEORGE W. WICKERSHAM.

THE POSTMASTER GENERAL.

---

EIGHT-HOUR LAW—LABORERS AT CUSTOMS PORTS.

The act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, includes in its scope such of the laborers employed at the various customs ports as are actually engaged in manual labor, and as to these laborers the act of March 15, 1898 (30 Stat. 316), has not repealed the provisions of the said eight-hour law.

The extension-of-hours act of March 15, 1898 (30 Stat. 316), applies only to employees in the Departments at the seat of Government.

DEPARTMENT OF JUSTICE,

*June 28, 1912.*

SIR: I have the honor to reply to your letter of February 7, 1912, requesting my opinion whether, *first*, the act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, includes in its scope laborers employed at the various customs ports, and if not, then whether, *second*, the act of June 25, 1868 (15 Stat. 77), is in force and is applicable to the employees mentioned.

I find it unnecessary to consider the second of these questions because, after a careful investigation of the subject, I am of opinion that the first question is to be answered in the affirmative, and that the eight-hour law does include in its scope the laborers employed at the various customs ports. In reaching this conclusion I have assumed that the "laborers" to whom you refer are not merely watchmen (26 Op. 622), but "laborers" in the ordinary sense, doing manual work.

482 *Eight-hour Law—Laborers at Customs Ports.*

The pertinent portion of the eight-hour law is as follows:

"An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or of any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency."

It has been suggested that this law does not apply to laborers not employed on "public works," even though they may be laborers regularly in the general service of the United States; but this suggestion has been disposed of by several opinions rendered by my predecessors (20 Op. 459; 25 *ibid.* 441; 26 *ibid.* 605; 26 *ibid.* 30, 36; 26 *ibid.* 622) and by the Comptroller of the Treasury (4 Comp. Dec. 578).

In these opinions I concur, notwithstanding the dictum to the contrary made by the District Court for the District of Washington in *United States v. Jefferson*, 60 Fed. 736.

It is true that the title of the act appears to make the suggested limitation in its scope, but the history of the legislation and the punctuation of the body of the text seem to put it beyond question that the limitation was not the intention of Congress.

The original eight-hour law (R. S. 3738) contained no reference to "public works," but applied in terms to "all

laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the Government of the United States." This statute proved ineffective because it was held to be not mandatory but merely directory (*United States v. Martin*, 94 U. S. 400), and also not to apply to laborers employed by independent contractors even though engaged on Government work (*United States v. Driscoll*, 96 U. S. 421).

The present act was passed avowedly to meet these two decisions and, as expressed in the reports of committees (H. Rept. 1267, 52d. Cong., 1st. sess.)—

"to secure a practical enforcement of the purpose intended to be secured by the act of 1868" (p. 6).

and to extend it—

"in plain terms to laborers and mechanics in the employ of contractors and subcontractors on Government works." (P. 6.)

The report further says—

"\* \* \* that the purpose of Federal legislation on this subject is to lend the influence and example of this Government to the authorities of States and municipalities, having a broader scope of jurisdiction in which to make the principle applicable: \* \* \* If we wish by the example of this Government to make the application of the principle universal, we must ourselves extend it to the limit of our jurisdiction."

To the same effect are the report in the Senate (S. Rept. 948, 52d Cong., 1st sess.), and the speech of Mr. Tarnsey, who had charge of the bill in the House of Representatives (23d Cong. Rec. 5723, and Appendix, 451) and the speech of Mr. Buchanan, another member of the committee (23d Cong. Rec. 5726) and of Mr. Dungan (23 Cong. Rec. 5733).

Furthermore, in the bill as originally drawn, a comma was inserted between "subcontractors" and "upon." This would have made the clause "upon any of the public works of the United States" relate to laborers employed



by the United States, or by the District of Columbia, as well as to those employed by independent contractors. Its omission in the final text, changing, as it does, the entire grammatical relation of these clauses, is significant, and exactly accords with the evident purpose of the later act, as it appears from the above legislative history.

It is plain from this history that the reference to "public works" was not intended as a limitation restricting the scope of the original act, but merely as a part of an extension of that act to laborers employed by independent contractors on such works.

There remains the question whether the act of March 15, 1898 (30 Stat. 277, 316), commonly known as the extension of hours act, has repealed the eight-hour law so far as concerns the laborers referred to in your question. That law provides as follows:

"SEC. 7. Hereafter it shall be the duty of the heads of the several executive departments, \* \* \* to require of all clerks and other employees, of whatever grade or class, in their respective Departments, not less than seven hours of labor each day \* \* \*: *Provided*, That the heads of the Departments may, by special order, stating the reason, further extend the hours of any clerk or employee in their Departments, respectively; but in case of an extension it shall be without additional compensation. \* \* \*

"SEC. 11. That all laws or parts of laws inconsistent with this act are repealed."

Whether this act, or its predecessor act of March 3, 1893 (27 Stat. 715) operated to repeal the eight-hour law to any extent whatever is a question upon which there might be some doubt, although the congressional history of both these later acts indicates that Congress recognized their inconsistency with the eight-hour law in so far as they cover the same field and intended to that extent to repeal that law (24 Cong. Rec. 1399, 1400, 1401, 1402, 2483; 31 Cong. Rec. 1252, 1253, 2638). And so it was held by the Comptroller of the Treasury (4 Comp. Dec. 578, 582).

However, it is not necessary to determine this question

because, in my opinion, the extension-of-hours act did not apply to laborers employed outside the Departments at the seat of Government, and therefore did not repeal the eight-hour law so far as concerned the laborers referred to in your question.

The terms "executive departments" and "departments," as ordinarily used in the acts of Congress, are terms of art, whose meaning is confined to offices and bureaus located at the seat of government, together with the so-called field forces, which in theory are only temporarily absent from Washington.

This was the ruling of Mr. Attorney General Harmon (21 Op. 338), construing the extension-of-hours act of March 3, 1893 (27 Stat. 715), which was the predecessor to the present act of 1898. The amendments made by the later act were slight and do not in any way affect the point in question, so that this opinion is properly to be considered as authority on the precise question. The opinion held (at p. 340) that the extension-of-hours act was confined, so far as related to the Treasury Department, to the clerks and employees at Washington.

The Comptroller of the Treasury has twice made the same ruling in reference to the present extension-of-hours act, holding that it did not apply to local inspectors of steam vessels under the Treasury Department (7 Comp. Dec. 125, 126) or to immigration inspectors in Porto Rico (14 Comp. Dec. 413).

These rulings are in accord with the long line of authorities holding, for instance, that phrases such as "clerks and employees in the departments" do not cover employees in customhouses and subtreasury, post offices, etc. (26 Op. 254); collectors of internal revenue, postmasters, and consuls (15 Op. 262, 267); employees under the Reclamation Service (13 Comp. Dec. 733; 11 Comp. Dec. 558, 595); employees of the Hydrographic Survey (10 Comp. Dec. 770); outside civil-service employees (3 Comp. Dec. 127); outside Weather Bureau employees (1 Comp. Dec. 559); and assessors of internal revenue (even covering the District of Columbia) (Pearson's Case, 9 Ct. Cls. 152-153).

This conclusion with reference to this particular act is confirmed by the paragraphs of the act succeeding the one above quoted, which are as follows:

"Hereafter it shall be the duty of the head of each executive department to require monthly reports to be made to him as to the condition of the public business in the several bureaus or offices of his department *at Washington*; and in each case where such reports disclose that the public business is in arrears, the head of the department in which such arrears exist shall require, as provided herein, an extension of the hours of service to such clerks or employees as may be necessary to bring up such arrears of public business" (30 Stat. 317).

Here it is distinctly indicated that Congress was concerned only with the offices at Washington. The fact appears to be, as these passages indicate, that the purpose of the legislation was to clear up arrears of work in the Departments proper at Washington, and the predecessor act was so explained by Mr. Cannon, in reporting the bill (14 Cong. Rec. 2317), where he stated that the Departments had asked large increases in the force of clerks to finish arrears in business and the Committee on Appropriations advised an increase of hours instead.

On several occasions when Congress has desired to apply certain of the provisions of the extension-of-hours act to employees outside of Washington it has been done by special act, which, of course, it would not have done had it intended these employees to be covered by the general bill. Thus, in 1890, desiring to give certain employees of the customs service outside of Washington certain of the privileges provided by the extension-of-hours act of 1883 (22 Stat. 563), it did so by the following special act:

"That all officers and employees of the customs service of the Government who receive a per diem compensation shall be entitled to receive the same leave of absence *as is provided for clerks and employees in the several executive Departments at Washington*, District of Columbia, by chapter one hundred and twenty-eight, section four, of the United States Statutes at Large, volume twenty-two, pages

five hundred and sixty-three and five hundred and sixty-four, approved March third, anno Domini eighteen hundred and eighty-three.

“SEC. 2. That the Secretary of the Treasury shall make all rules and regulations necessary to carry the provisions of this act into effect (26 Stat. 362).”

In this language Congress itself specifically described the act of 1883 (which was one of the earlier forms of the present hours-of-service act) as applying to the clerks and employees “at Washington.”

Similarly, Congress has passed special acts giving the leave-of-absence privilege to letter carriers (23 Stat. 60), to clerks and employees in the first and second class post offices (26 Stat. 648) and to railway postal clerks (30 Stat. 964), none of which enactments would have been necessary if clerks outside of Washington had been covered by the general hours-of-service law.

Finally, it is very significant that after Attorney General Harmon had rendered his opinion above cited, construing the extension-of-hours act of 1893 as not applicable outside of Washington, Congress reenacted that statute in its present form, which made no change in any respect material to the point decided. Under the familiar rule, therefore, it is to be assumed that the construction placed upon the act by the Attorney General accorded with the views of Congress. (*United States v. Hermanos*, 209 U. S. 337.)

For these reasons I concur with this opinion of Mr. Attorney General Harmon rather than with the opposite opinion of Mr. Attorney General Griggs (22 Op. 77), to whose attention Mr. Harmon's opinion and its acceptance by Congress was apparently not called.

There is also a question whether the extension-of-hours act, even if applicable outside of Washington, would cover the laborers referred to in your question. The Comptroller of the Treasury has held that it does not apply to laborers whose wages are not fixed by law or regulation (4 Comp. Dec. 578, 583). That opinion, so far as I know, has never been overruled or questioned, and it is consistent with the reasoning in the opinion of Mr. Attorney General Harmon

(21 Op. 338). However, it is not clear whether any of the laborers referred to in your question would fall within the spirit and reason of this limitation, as stated by the Comptroller, and in the view I have taken it is not necessary now to decide the point.

I am of opinion, therefore, that the eight-hour law includes in its scope such of the laborers employed at the various customs ports as are actually engaged in manual labor, and that as to them it has not been repealed by the extension-of-hours act.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

---

#### AMMUNITION—EIGHT-HOUR LAW.

The practical meaning of the word "ammunition" as used in the proviso in the fortification act of June 6, 1912, under the heading of "Armament of fortifications," is much for the determination of the departments for which it is especially intended, and as this proviso is mainly for the guidance of the War and Navy Departments and those purchasing material for them, it may well be taken that the generally accepted meaning of the word in these departments was the one intended.

Ammunition means something different from materials for ammunition. It is generally the assembled or practically complete product, substantially ready for use in firearms.

The requirement of the law that a contractor for ammunition shall have established an eight-hour workday for all of his employees engaged upon the work under contract is to be construed as prohibiting his working such employees more than eight hours a day. The Attorney General declines to express an opinion as to what, if any, steps must be taken under the proviso by the contracting officer, and what is the status of claims presented for payment for labor and material furnished under a contract, in the event that a contractor who had actually announced an eight-hour workday before obtaining his contract should afterwards for any reason revert to a longer workday, as the question is hypothetical.

The eight-hour workday restriction of this proviso does not apply to purchases of ammunition made abroad.

DEPARTMENT OF JUSTICE,

*July 1, 1912.*

SIR: I have the honor to comply with your request, under date of June 24, 1912, for an opinion as to the construc-

tion of a portion of the fortification act of June 6, 1912 (37 Stat. 125), under the heading of "Armament of fortifications."

The provision referred to is as follows:

"\* \* \* *Provided*, That, except in time of war or when, in the judgment of the President, war is imminent, no part of this or of any other sum in this act for ammunition shall be expended for the purchase of any ammunition from any person, firm, or corporation which has not at the time of commencement of said work established an eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the work of manufacturing the ammunition named herein."

The questions submitted are these:

"(1) What is to be considered as ammunition within the meaning of the proviso quoted?

"(2) Is the requirement that a contractor for ammunition shall have established an eight-hour workday for all his employees engaged upon the work under a contract to be construed as prohibiting his working such employees more than eight hours per day?

"(3) What, if any, steps must be taken under this proviso by the contracting officer, and what is the status of claims presented for payment for labor and material furnished under a contract, in the event that a contractor who had actually announced an eight-hour workday before obtaining his contract should afterwards, for any reason, revert to a longer workday?

"(4) Does the limitation of the proviso apply to purchases of ammunition made abroad?"

1. Referring to the first question, it is probably impossible to state authoritatively just what is "ammunition" within the meaning of this proviso. Yet the word has an ordinary and generally recognized meaning sufficient for practical purposes, and, by familiar rules of construction, this ordinary meaning must be taken to be the one intended, as no other is indicated.

Then, too, peculiarly in the War and Navy Departments, this word has a more definite and certain meaning; and as this proviso is mainly for the guidance of these depart-

ments and those purchasing material for them, it may well be taken that the generally accepted meaning of the word in these departments was the one intended.

It is also certain that the word "ammunition" means something different from materials for ammunition. Thus, powder is ammunition; but the saltpeter and other materials of which it is composed are not. It is generally the assembled or practically completed product, substantially ready for use in firearms, which is ammunition. The word, as here used, means something which is already ammunition and does not require some further process of manufacture to make it such or to fit it for use as ammunition. Shot, shells—whether loaded or not—shrapnel, bullets, powder, percussion caps, fulminating powder, cartridge cases, fuses, etc., intended for firearms, may well be called ammunition.

As illustrative of the difference referred to, the Chief of Ordnance very properly says:

" \* \* \* This department purchases material for the manufacture of projectiles, cartridge cases, powder bags and fuzes, both in commercial shapes and partly completed states, and it is not certain whether or not such material is to be considered ammunition within the meaning of the proviso. For instance, the steel cases for shrapnel are sometimes purchased in the form of drawn cylinders, closed up at one end, tempered and ready for machining to finished dimensions; at other times, the material is procured in the form of bar steel, and the cases produced by turning and boring. Brass for cartridge cases and fuzes is purchased in sheet or bar form, and silk material for cartridge bags in rolls. The bar steel and brass and the sheet brass mentioned are commercial shapes, and, as far as the shape and quality are concerned, are suitable for many other purposes besides the manufacture of ammunition, while the drawn steel cases and the disks from which they are drawn are not. As a rule, this department does not purchase ordinary commercial material for any one specific purpose. It is procured for stock, and after procurement is issued for any and all purposes for which it is applicable. The at-

tempt to separate commercial material so that part should be produced upon an eight-hour basis, while for the remainder no such limitation was required, would be most inconvenient for this department, and would obviously be most embarrassing for contractors, of whom the Government is only one of many customers. In that event, it is unlikely that a large manufacturing concern would make the radical change in its business methods that such a requirement would involve, and consequently the procurement of commercial material under the eight-hour restriction would be difficult and perhaps impossible."

Such considerations have much weight in determining the answer to this question; and when Congress uses a word of such uncertain meaning as the one here considered, but which has in the department for which the provision is especially intended a more definite and certain meaning, it may well be taken that the latter was intended. So that the practical meaning of the word here used is much for the determination of the department for which it is especially intended. And as the Supreme Court has more than once said, such departmental construction will not be interfered with, except for cogent reasons.

2. Answering your second inquiry, I beg to advise you that, in my opinion, the requirement of the law that a contractor for ammunition shall have established an eight-hour workday for all his employees engaged upon the work under contract is to be construed as prohibiting his working such employees more than eight hours a day. The provision in the fortification act of June 6, 1912, is similar to those in the naval appropriation act approved March 4, 1911, and in an opinion to the Secretary of the Navy of December 21, 1911 (29 Op. 279, 283-284), it was held that the eight-hour workday provisions in the earlier act prevented the working of employees, laborers and mechanics more than eight hours a day, under "overtime" regulations, in the construction of the vessels and their machinery therein referred to. The eight-hour restrictions in these later statutes are not merely "directory," as has been held in the case of the provision of section 3738 of the Revised



Statutes that eight hours shall constitute a day's work for all employees, workmen, and mechanics who may be employed by or on behalf of the Government of the United States (*United States v. Martin*, 94 U. S. 404; *Laurey v. United States*, 32 Ct. Cl. 266; 17 Op. 341; 19 id. 685). As said in the opinion of December 21, 1911 (29 Op. 284), where it was held that the purpose of the eight-hour provisions in the naval appropriation act was to apply to the construction of the vessels therein authorized the eight-hour law of August 1, 1892 (27 Stat. 340), which absolutely prohibits the working of laborers and mechanics on public works more than eight hours a day, except in case of extraordinary emergency:

“The underlying purpose of all this legislation is to confer upon workmen the benefits, physical and moral, supposed to flow from a reduction of their labor to eight hours a day; not to increase their wages by enabling them to secure additional pay, if practicable, for working more than eight hours a day. Such statutes are paternalistic in character, and it is not intended that their benefits should be nullified through contracts made by the beneficiaries.”

3. The third question is a hypothetical inquiry which, under well-settled rules, I must ask you to excuse me from answering (19 Op. 414; 20 Op. 288, 729; 21 Op. 106, 510).

4. The remaining question is whether the requirement of this proviso, that contracts for ammunition shall be made only with manufacturers who adopt the eight-hour rule, applies to such contracts made in foreign countries.

Taking the language of this proviso literally, there is no doubt that it applies equally wherever such contracts are made. But the literal language of an act does not always govern its construction. There is another important and often potent rule of construction which requires that every legislative act be construed with reference to its purpose and object, and it is not infrequent that the plain language of an act gives way under this rule.

There can be no doubt that the sole purpose of this proviso was the betterment of the conditions of our own people, and especially the laboring class. It was not at all

to give to the Government more, better, or cheaper work, nor was it to better the condition of any foreign people.

The act itself contemplates that substantially all of this ammunition shall be of American manufacture, and provides expressly "that all material purchased under the provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases in limited quantities abroad." And the Chief of Ordnance points out in this case:

" \* \* \* It is often advantageous and sometimes necessary for this department to purchase artillery ammunition and parts thereof abroad. The articles thus purchased are usually small lots, embodying the latest improvements which it is desired to examine and test, or larger quantities of articles which can not be produced in this country of the quality or at the rate of delivery desired. If this proviso be held to apply to such purchases, it will be practically impossible to make them, and the Government will be deprived of an important advantage without any adequate compensation therefor."

There would seem to be no possible reason why Congress should intend to extend this requirement to the few such purchases as are or may, under this act, be made abroad. On the contrary, such a requirement would be very disadvantageous to the Government and would amount to a practical prohibition of any such purchases, and would, in no sense, tend to subserve the only purpose of this proviso.

Here, too, in construing this proviso and its application, we must consider, as in each of the previous questions, that this provision is in derogation of the common right of the Government itself to go into the open market and purchase its necessary supplies upon the most favorable terms which such market offers. Such a restriction has an important purpose, or it would not be there. It would seem unreasonable to suppose that such a restriction was intended to apply to purchases made abroad and where its observance would not in the slightest degree serve a single purpose of such requirement.

It is needless here to recall the very many instances in which language quite as plain and imperative as this has given way to a construction based upon the manifest purpose, object and intention of the whole act.

For these reasons I am of the opinion that the requirement referred to does not extend to purchases made abroad.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

FOOD AND DRUGS ACT—AUTHORITY TO MAKE RULES AND REGULATIONS AND REVIEW FINDINGS OF FACT.

The Secretaries of the Treasury, Agriculture, and Commerce and Labor are restricted to the making of rules and regulations for carrying out the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768), and have no authority to review findings of fact and reports made to the Secretary of Agriculture.

The findings of the Referee Board of the Department of Agriculture are not conclusive on the courts or the Secretary of Agriculture, but are simply for the information of the latter.

The approval of the Secretary of Agriculture of a finding of the Referee Board is notice to the public that in subsequent examinations of food samples such finding will be followed.

DEPARTMENT OF JUSTICE,

*July 8, 1912.*

SIRS: I beg to acknowledge the receipt of your letter of the 14th of May, propounding certain questions which have arisen in the enforcement of the food and drugs act of June 30, 1906 (34 Stat. 768).

You state that the referee board of consulting scientific experts of the Department of Agriculture has lately completed an investigation on the use in foods of copper salts, "the results of which investigation show that foods containing copper salts are adulterated under the food and drugs act, and articles greened with copper salts must therefore be refused entry into the United States and excluded from interstate commerce."

You then state that doubts have arisen whether the announcement of the conclusions of the board shall be

made by the three Secretaries in conformity with the practice which has existed heretofore, or by the Secretary of Agriculture alone, and I am specifically asked:

1. Are the three Secretaries restricted to the making of rules and regulations, or have they any authority to review findings of fact and reports made to the Secretary of Agriculture?

2. If the findings of fact and reports have been approved, should the three Secretaries participate in the announcement, or does the law contemplate that the announcement shall be made by the Secretary of Agriculture alone?

Section 3 of the food and drugs act provides that the three Secretaries "shall make uniform rules and regulations for carrying out the provisions of this act."

Under the provisions of section 4, the examination of specimens of foods and drugs collected under the rules made by the three Secretaries is to be made in the Bureau of Chemistry of the Department of Agriculture or under the direction and supervision of that bureau; if such examination shows a violation of the law, a hearing is given to the party from whom the sample was obtained. Regulation 5 provides that this hearing may be had before the Secretary of Agriculture, or such other official connected with the food and drug inspection service as may be commissioned by him for that purpose. In practice I understand the hearing is had before the board of food and drug inspection in Washington, or such officer of the Bureau of Chemistry throughout the country as may be most convenient in each case.

Under the provisions of sections 4 and 5 of the act, when it is made to appear on such hearing that the law has been violated, the papers are to be certified by the Secretary of Agriculture to the proper officer of this Department for prosecution.

By section 11, in the case of imports the Secretary of the Treasury is to deliver samples to the Secretary of Agriculture, upon the latter's request, and opportunity for a hearing before the Secretary of Agriculture is to be accorded to the owner or consignee. If it appears from such examination that such articles are adulterated or misbranded, then they are refused admission into this country.

It clearly appears from this brief statement that the direct and active enforcement of the statute is cast upon the Department of Agriculture and upon that Department alone. The sole duty of the three Secretaries in connection with the law is the making of rules and regulations for carrying out its provisions.

With this understanding of the law, I think the answer to your questions is plain.

The referee board was established by the Secretary of Agriculture and is a board of his Department. By letter to me of March 23, 1909, the Secretary stated that the members of the board are charged with the duty of considering and reporting to him upon the wholesomeness or the deleterious character of such foods, or articles used in foods, as might be referred to them, their sole function being to investigate and report (27 Op. 300-305).

This board has, at the direction of the Secretary of Agriculture, investigated the effect of copper salts as a preservative of foods and has reported that copper salts are an added deleterious ingredient, which may render injurious to health the articles to which added.

I understand that in similar investigations made by this board the report has been submitted to the three Secretaries, and, if approved by them, a rule has been promulgated to the effect that the preservative investigated will, or will not, constitute an adulteration, as the case may be.

I take it that such rules have been made under a misapprehension of the true meaning of the statute. I understand that the finding of the referee board is not conclusive upon the courts should the question of the correctness of such finding properly arise in a case. On the contrary, I understand that the report of the referee board is no more than the statement of the board in each case that, in the opinion of the eminent chemists composing it, the use of the preservative in question is, or is not, deleterious to the human system.

This report is not binding upon the Secretary of Agriculture, but is simply for his information and guidance. Should he approve the finding of the board, and so announce to the public, I understand that this announcement

is merely a statement that in the subsequent examinations of samples of foods collected under the food and drugs act the decision thus made will be followed. To take the present case as an illustration, it is a statement to the public that the Department of Agriculture regards the addition of copper salts to articles of food as an adulteration and will report all such cases to this Department for prosecution.

I am, therefore, of the opinion that the three Secretaries are restricted to the making of rules and regulations and have no authority to review findings of fact and reports made to the Secretary of Agriculture.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARIES OF THE TREASURY, OF  
AGRICULTURE, AND OF COMMERCE AND LABOR.

---

PORTO RICO—LEGALITY OF BOND ISSUE.

The issuance of bonds by the government of Porto Rico for port improvements at San Juan, as provided by an act of the legislative assembly of Porto Rico, approved March 7, 1912, not being in excess of 7 per centum of the aggregate tax valuation of its property and complying in every other respect with the terms of the organic act, is legal.

The form of the proposed bond appears to comply with the provisions of section 2 of said act of March 7, 1912, the relevant section upon this matter.

DEPARTMENT OF JUSTICE,

*July 11, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, inclosing a copy of an act of the legislative assembly of Porto Rico, approved March 7, 1912, authorizing the treasurer of Porto Rico to issue bonds of the people of Porto Rico to the amount of \$500,000 for the purpose of constructing a permanent bulkhead in San Juan Harbor, and making other improvements therein, together with a draft of the form of bond proposed to be issued under the authority of the said act. You request my opinion on the legality of this issue of bonds and as to the correctness of the proposed form.

The nature and extent of the power conferred by Congress in the Porto Rico Organic Act of April 12, 1900 (31 Stat. 77), on the people of Porto Rico to incur obligations in anticipation of taxes are so fully considered in my opinions of April 15, 1910 (28 Op. 245), and of June 26, last (29 Op. 468), as to make anything more than a reference to these opinions unnecessary in this case. The power so granted by Congress is broad and general in its scope, being limited only by the provision that the indebtedness incurred under its authority shall not exceed 7 per centum of the aggregate tax valuation of the property of the corporation concerned. In the present case you state that this limitation will not be exceeded by the proposed issue and it is evident that in every other respect the terms of the organic act have been complied with. The case does not differ in any respect from that of the road and bridge bonds, whose legality was affirmed in the opinion of April 15, 1910, just referred to.

I have examined the form of registered bond submitted by you, and it appears to comply with the provisions of section 2 of the act of the legislative assembly of Porto Rico of March 7, 1912, the relevant section upon this matter.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

#### NORTHERN PACIFIC LAND GRANT—INDEMNITY SELECTIONS.

In selecting indemnity lands for the loss of mineral lands the Northern Pacific Railway Co. is not limited to the State in which the loss occurred.

The company may select as indemnity lands within the primary limits, which at the time the grant attached were "reserved, sold, granted, or otherwise appropriated," but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated public lands.

The indemnity selection for lost mineral lands may be made within 50 miles of the line of the road.

Where there is a discrepancy between the printed statutes and the enrolled act the latter will control.

DEPARTMENT OF JUSTICE,

*July 24, 1912.*

SIR: I have the honor to reply to your letter of December 12, 1911, requesting an opinion concerning certain indemnity lands selected by the Northern Pacific Railway Co. in lieu of lands lost from the primary grant because of their mineral character.

The bases assigned in support of these selections are lands in the State of Montana which have been classified and approved as mineral under the act of February 26, 1895. (28 Stat. 683.) The selections were made under the last proviso to section 3 of the act of July 2, 1864. (13 Stat. 367.)

The material portions of section 3 are as follows:

“Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, \* \* \*

*Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and



in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, *and within fifty miles thereof*, may be selected as above provided."

The underscored words "*and within fifty miles thereof*," in the above quotation do not appear in the act as published in the Statutes at Large, but are in the act as passed and approved, and as recorded in the State Department.

The lands selected are in the Wausau land district, in Wisconsin. They are all of odd-numbered sections, and all but two are within the 20-mile or primary limit. These two, however, are situated outside both the primary 20-mile limit and the secondary 10-mile limit, but are in fact within "fifty miles" of the line of road as definitely located.

You request an opinion upon the three following questions:

"1. In the matter of indemnity for mineral lands excluded from its grant, is the company limited to the State in which the loss occurred?

"2. May the company select, as indemnity, lands within the primary limits, which, at the time the grant attached, were 'reserved, sold, granted, or otherwise appropriated,' but which since said time, have been relieved of said impediments and are, at the time of the selection, unoccupied and unappropriated public lands?

"3. Are lands lying 'more than 10 miles beyond the limits of said alternate sections' granted by the act of 1864, but 'within 50 miles' of the line of road, subject to selection as indemnity for mineral lands lost to the grant by reason of exclusion under the terms thereof?"

It appears from the legislation in question that it was the intention of Congress to give to the Northern Pacific Railroad Co. every alternate odd-numbered section of land throughout a strip 40 miles wide on each side of the road in the Territories and 20 miles wide in the States; and the particular sections given were automatically fixed upon the filing and approval of the map of the right of way. If, for any of the reasons mentioned in the statute, the

United States could not give good title to any agricultural sections within this primary belt, the company was to have in lieu thereof a similar amount of land within an adjoining belt 10 miles wide; and such lieu sections were also to be alternate and odd-numbered and were to be selected under the direction of the Secretary of the Interior.

All mineral lands were excepted from this grant, in lieu of which a like quantity of agricultural lands in odd-numbered sections nearest to the line of railway and within 50 miles thereof was to be selected.

1. I am of the opinion that in selecting indemnity lands for the loss of mineral lands the company is not limited to the State in which the loss occurred. Attorney General Garland thus answered the question, so far as losses of agricultural lands were concerned, in his opinion of January 17, 1888 (19 Op. 88), and this ruling has been consistently followed by your Department.

*Northern Pac. R. R. Co.* (on review) (20 L. D. 187).

*Northern Pac. R. R. Co. v. Shepherdson* (24 L. D. 417).

*Hagen v. Northern Pac. R. R. Co.* (26 L. D. 312).

There is no reason for a different ruling in regard to mineral losses.

2. I am of the opinion that the company may select as indemnity lands within the primary limits, which at the time the grant attached were "reserved, sold, granted, or otherwise appropriated," but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated public lands.

While there is some apparent conflict in the decisions on this question, I think the true rule is laid down by the Supreme Court in *Ryan v. Railroad Co.* (99 U. S. 382), and *United States v. Southern Pacific Co.* (223 U. S. 565). See also 26 L. D. 452 and 29 Op. 124, 129, 130.

In the *Ryan* case, the grant to the California & Oregon Railroad Co. was in terms similar to those of the grant involved here; at the time of the grant a part of the land within the indemnity belt was subject to a Mexican claim, which was subsequently rejected, and a patent issued to the railroad for this as indemnity land. Ryan, a homesteader, later settled on the same section and also received a patent. In a suit between them to determine the lawful title, the court admitted that at the time of the original grant, the

section, being *sub judice*, would not have been public land within the meaning of the statute, but by the subsequent dismissal of the claim it had become so, and was as open to selection by the railroad as any other land within the indemnity belt.

In *United States v. Southern Pacific Company* (223 U. S. 570); Mr. Justice Holmes, speaking of the Ryan case, said:

“An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, *but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice.* \* \* \* It seems to us, in short, that *Ryan v. Railroad Company*, *supra*, should be taken to establish a general principle and should not be limited to its special facts.”

This construction seems to me to accomplish the purpose of Congress. Undoubtedly Congress intended that the railroads should have these odd-numbered sections within the primary limits in return for the accomplishment of its great enterprise. The exception of lands to which other claims had previously attached was not designed to serve as a technical pretext whereby that which had been granted might thereafter be withdrawn. It was created for the purpose of protecting homesteaders and others who might settle upon the lands before the railroad's line was definitely located. It is wholly unnecessary to the accomplishment of this purpose that after these homestead claims have ceased to exist their temporary interposition should continue to be effectual to prevent the accomplishment of the underlying intent of Congress. And although the fiction of the *gift in presenti* may properly prevent their passing under the primary grant, I see no reason why they should not be subject to selection as indemnity lands, at least under provisions phrased like the mineral indemnity proviso in the present charter.

3. Your third question involves the question whether the published statute or the act as passed and enrolled and recorded in the State Department is to control.

It is my opinion that the law as passed by Congress ought not to be altered by a printer's error. "Where there is a discrepancy between the printed statute and an enrolled act all the authorities agree that the latter controls." *Lewis' Sutherland on Statutory Construction* (sec. 74) and cases there cited. See also *Bishop on the Written Laws* (sec. 37), *Clare v. State of Iowa* (5 Iowa 509); *State v. Marshall* (14 Ala. 411); *State v. Byrum* (60 Neb. 384); *Johnson v. Barham* (99 Va. 305).

I am, therefore, of the opinion that the indemnity selection for lost mineral lands may be made within 50 miles of the line of the road.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

---

ELIGIBILITY OF RETIRED NAVAL OFFICERS FOR APPOINTMENT IN THE CLASSIFIED SERVICE.

A retired officer of the Navy whose retired pay amounts to \$2,500 per annum is within the prohibition of section 2 of the act of July 31, 1894 (28 Stat. 205), and is ineligible to hold office as clerk of class 3 under the United States Civil Service Commission.

The position of a clerk of class 3 under the United States Civil Service Commission, the appointment thereto being authorized by the President, is an office within the meaning of section 2 of the act of July 31, 1894.

DEPARTMENT OF JUSTICE,

August 12, 1912.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo, inclosing a letter from the Civil Service Commission in reference to the case of Commander Homer C. Poundstone, United States Navy, retired, and requesting my opinion thereon.

It appears that Commander Poundstone has been retired from active service in the Navy, and as such retired officer is in the receipt of a salary amounting to \$2,500 per annum. He has now been placed by order of the President upon the

rolls of the United States Civil Service Commission as a clerk of class 3 under instruction for duty as district secretary at Philadelphia, and the question is as to the legality of this latter employment.

Section 2 of the act of July 31, 1894, chapter 174 (28 Stat. 205), provides, in part, as follows:

“\* \* \* No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.”

It is clear, both on principle and according to the authorities, that a retired officer of the Navy holds an office with a salary or annual compensation attached within the meaning of the above enactment, even if the express language of the exception be not considered. The status of retired Army officers (and in this regard a retired officer of the Navy does not differ from a retired officer of the Army) was considered with great fullness and precision by the Solicitor General in his opinion of May 17 last. (29 Op. 397.) He there discusses the case of *United States v. Tyler* (105 U. S. 244), and, referring to *People v. Duane* (121 N. Y. 367), says:

“\* \* \* The continuance of honor and emolument to officers retired from active service is in part in consideration of faithful service in the past, but it is also true, and that is the reason of the opinion in the Tyler case, ignored in the Duane case, that honor and emolument are continued to these officers, because they are continued in the service. They may not be always or ever actively engaged, their brothers on the active list may be sufficient for every present need of Government, but, like those brothers, they are always subject to the call of duty, and it is to be said of them, and was said of them in Tyler’s case, that—

“‘They also serve who only stand and wait.’”

The Solicitor General also discusses the case of *Geddes* (38 Ct. Cl. 428), and, after quoting from the language of the majority opinion in the case, he says of it:

“This reasoning, as the minority hold, is in direct conflict with that of *United States v. Tyler, supra*, and can not be accepted as a correct statement of the law.”

It follows necessarily from this opinion that Commander Poundstone falls within the prohibition of section 2 of the act of July 31, 1894, *supra*, and is ineligible to hold office as clerk of class 3 under the United States Civil Service Commission; and this conclusion is rendered irresistible by the proviso to that act excepting retired officers of the Army or Navy in certain cases, of which this is not one.

That the position of a clerk of class 3 under the United States Civil Service Commission, the appointment thereto being authorized by the President, is an office within the meaning of section 2 of the act of July 31, 1894, *supra*, is determined by the decision of the Supreme Court in *United States v. Hartwell*. (6 Wall. 385.)

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

---

EIGHT-HOUR LAW—CONTRACTS FOR THE PURCHASE OF  
SUPPLIES BY THE GOVERNMENT.

The eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies to contracts for the purchase of supplies by the Government where the work incident to the manufacture thereof has ordinarily been performed by the Government up to the time of the making of the contract therefor, and not merely occasionally or to a limited extent, and it is immaterial whether the contractor furnishes both materials and labor or labor only.

The said act of June 19, 1912, becomes effective January 1, 1913, and hence only contracts thereafter made are required to contain the eight-hour restriction and the penalty stipulation provided for therein.

DEPARTMENT OF JUSTICE,

August 19, 1912.

SIR: I have the honor to acknowledge the receipt of your letter of the 17th ultimo calling my attention to the eight-

hour law enacted June 19 last and submitting several questions regarding its application to contracts about to be let by your Department.

Your questions are specifically:

"1. Do the provisions of section 1 of the act apply to contracts for the purchase of cloth and other supplies manufactured according to specifications required for the use of the United States Army?

"2. Do the provisions of said section 1 apply to contracts for the manufacture of clothing, tents, and other supplies in the manufacture of which the Government may have heretofore engaged on its own account (*a*) where the manufacturer supplies all materials and labor, and (*b*) where the Government supplies the materials and contracts for the performance of the labor only?

"3. Should the provision regarding the employment of labor be inserted in contracts now to be awarded for supplies for the entire current fiscal year?"

Your letter further states that "the War Department has from time to time engaged in the manufacture of clothing, tentage, and various equipments for the Army on its own account, using materials purchased for the purpose, but that as a general rule the Government awards contracts for the manufacture of clothing furnishing material therefor." and that "while at various times the Government may have engaged to a limited extent in the manufacture of almost every class of supplies, the greater portion of supplies for immediate consumption is purchased in open market or under contract."

Looking at the act of June 19, 1912 (37 Stat. 137), in order to ascertain its general scope, it is found that section 1 lays down the rule which is to govern all contracts hereafter entered into by the United States or on its behalf, prescribes the penalty for a violation of its requirements and the mode of redress where the penalty is unjustly exacted, while section 2 states the exceptions to the rule and the qualifications and limitations thereof.

The rule is thus stated in section 1:

"That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a

party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work \* \* \*."

After thus stating the general rule that an eight-hour day shall be established as to all work done under contract with the United States and involving the employment of laborers or mechanics, section 2 proceeds to formulate exceptions to the general rule, as follows:

"That nothing in this act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: \* \* \*."

The cases mentioned are thus excepted from the operation of the general principle established by section 1 and are left to be governed without reference to the act. But to these exceptions there is attached a proviso, the effect of which under the settled canons of construction must be to limit and narrow the exceptions, to create an exception to the exceptions. That proviso is as follows:

"\* \* \* *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms,



or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this act."

It is clear that this proviso is susceptible of a construction which will nullify, in whole or in part, the portion of the act to which it is attached and whose general provisions it is meant merely to limit. If the words in the proviso, "which have been, are now, or may hereafter be performed by the Government," be taken literally, then, since practically every conceivable class of work, and certainly every class of work mentioned in the exceptions at the beginning of section 2, either has been in the past or may be in the future performed by the Government, the proviso would simply put back under the ban of section 1 the very contracts which had just been excepted from that section. For example, section 2 provides that nothing in the act shall apply to the construction or repair of levees. Clearly the construction or repair of levees either has been or may hereafter be performed by the Government. If, then, the construction now under consideration be given to the proviso, the result will be that the construction of levees will be taken from the provisions of the act in one breath, only to be restored the next.

The purpose of a proviso is, as stated above, merely to qualify or limit the enactment to which it is attached. It can never be taken to nullify or destroy it. It is necessary, therefore, to find a construction of this proviso which, while giving it due effect as a limitation, will yet not make it destructive of the other provisions of the act.

It must be remembered at the outset that the act of August 1, 1892 (27 Stat. 340), provided:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, \* \* \* is hereby limited and restricted to eight hours in any one calendar day \* \* \*",

and that this act is expressly continued in force by the act of June 19, 1912. The effect of the act of August 1, 1892, was to make the Government in all respects an eight-hour-

a-day employer as regards laborers and mechanics. (20 Op. 459; Op. June 28, 1912, 29 Op. 481.) Bearing this in mind, the intent of Congress in the act of June 19, 1912, may be developed thus: It first established a general rule which would require *every* contract made by the Government involving the employment of labor to be carried out on an eight-hour basis. It then at once occurred to Congress, and indeed it had been pointed out by the President in his message on the subject, that there were certain classes of contracts where the application of an eight-hour law was impracticable, either by reason of peculiar conditions of nature, as contracts for transmission of intelligence, or for transportation by land or water, or by reason of continuous, ever-present emergency, as in construction of levees, or, as in the case of supplies and articles ordinarily bought in the open market, because wholly impracticable from the standpoint of the Government and the contractor alike. Accordingly Congress, by section 2, excepted these cases from the operation of the all-embracing provision of section 1. Up to this point there is no difficulty in interpreting the meaning of the act. But the language of the proviso read in connection with the earlier part of section 2 presents a more difficult question of construction.

The debates in the House over these provisions indicate an intention on the part of the framers of the act to prevent by means of this proviso the use by officials of the Government of the exceptions in section 2 to evade the requirements of the act of August 1, 1892, by causing work of the general nature ordinarily performed directly by the Government itself to be done by contract or under it.

In the bill as originally introduced the exception only embraced "all classes of work *now* being performed by the Government." (48 Cong. Rec., Dec. 14, 1911, p. 337.) The committee amended this by changing the words "now being" to read "which have been, are now, or may hereafter be." (48 Cong. Rec., Dec. 14, 1911, pp. 337-338.)

Debating this proviso, the ambiguity of which was pointed out by Mr. Norris and Mr. Mann, Representative Hughes, who was especially advocating the passage of the bill, said the intent of the proviso was "to take from out

of the exception all classes of work which have been, are now, or may hereafter be performed by the Government." (48 Cong. Rec., Dec. 18, 1911, pp. 469, 470.) He acknowledged that he was in doubt as to the meaning of the words "which have been," yet he contended that the words in the proviso described work of such character that it showed that Congress "knew just what the Government was making for itself, and therefore they limited the proviso to things that were now being made by the Government." He said (ib. 470):

"\* \* \* this proviso means to say to the Government that work that already falls under an eight-hour classification and is now being done by the Government under an eight-hour law shall be done under the eight-hour law by contract; work which the Government is now engaged upon and activities of various kinds, such as building guns, constructing battleships, manufacturing powder, and doing river and harbor work, doing it all under the eight-hour law. Now, if the Government attempts to have that work done by a private individual or a contractor, under the provisions of this act, we insist that it shall be done under those conditions, too."

Mr. Mann then said:

"\* \* \* The forepart of section 2, having provided for the purchase of supplies by the Government and stipulated what it is to be required to perform under the act, then the gentleman wants to provide, as I understand \* \* \* that if the Government undertakes in its work to purchase supplies not in the open market, but by contract, it must be on the eight-hour basis. \* \* \*

"In other words, it is not proposed that where the Government does work now under the eight-hour law it shall not<sup>1</sup> evade that by entering into a contract with a private contractor?

"Mr. HUGHES. Yes; that is the extent to which I want to go."

Assuming this to be the intent of the proviso, and it being essential to give it a construction which shall accord with the other provisions of the act, the words "which have

---

<sup>1</sup> In order to make sense, "not" should be omitted.

been, are now, or may hereafter be performed by the Government," *can not be taken literally, but must be construed as referring to work which, up to the time of the making of the contract therefor, has ordinarily been performed by the Government, and not merely occasionally or to a limited extent, so that to let the same upon contract would indicate an intention to evade the eight-hour restriction of the act of August 1, 1892.* To illustrate: In view of your statement that "the War Department has from time to time engaged in the manufacture of clothing, tentage, and various equipments for the Army on its own account, using materials purchased for the purpose, but that *as a general rule* the Government awards contracts for the manufacture of clothing, furnishing material therefor," I should say that, under the circumstances stated, the eight-hour restriction need not be incorporated in contracts for such clothing.

What has been said, with the statement that, in my opinion, it is immaterial whether the contractor supplies both materials and labor or labor only, appears to answer your first and second questions.

Your third question is whether the provision regarding the employment of labor should be inserted in contracts now to be awarded for supplies for the entire current fiscal year.

The first section of the act provides that "every contract hereafter made \* \* \* shall contain" an eight-hour work-day restriction, as well as a penalty stipulation for a violation thereof. Section 3 provides that "this act shall become effective and be in force on and after January 1, 1913."

It appears that section 3 was added in the Senate without debate (48 Cong. Rec., 7418, May 24, 1912), so that this provision must be understood as having been accepted by that body as meaning just what it said. When the bill was returned to the House, Mr. Wilson, of Pennsylvania, who was in charge thereof, referring to this amendment, said that "it changes the date upon which the act shall go into effect to January 1 next, the presumption being that that is for the purpose of allowing those who are making bids to have an opportunity to make their establishments

conform to the changed conditions." (48 Cong. Rec., 8152, June 5, 1912.)

Mr. Wilson's statement suggests that it may have been his understanding that notwithstanding the provision postponing the taking effect of the act, contracts entered into subsequent to the passage of the act and prior to January 1, 1913, should contain the eight-hour restriction and penalty stipulation mentioned, the operation of the same only being postponed until the later date. So the provision of section 2 of the act that "nothing in this act shall be construed to \* \* \* apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act," seems to imply that the act, notwithstanding the provision of section 3, was still to apply to contracts made after its passage. But these inferences are too vague, in my opinion, to justify a disregard of the plain meaning and effect of section 3. That section expressly fixes the time when the act shall become effective and be in force; and as the only requirement of the act is that contracts thereafter made shall contain the eight-hour restriction and penalty stipulation, when Congress said that the act should become effective and be in force on the later date, it can only be understood to have been meant that until that date the mandate of the act in the respect mentioned should be regarded as innocuous. In other words, in view of the provision of section 3 that "this act shall become effective and be in force on and after January 1, 1913," the words "every contract hereafter made" in section 1 must necessarily mean that every contract made after the act becomes effective shall contain the provisions mentioned. To hold that the mandate of the act as to the insertion in contracts of the eight-hour restriction and penalty stipulation became operative on its passage despite section 3, but that such *contractual* provisions were not to become operative until January 1, 1913, is to write a new act. I therefore answer your third question in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

POSTAL SAVINGS SYSTEM—ACCEPTANCE OF DIVIDENDS  
ON DEPOSITS.

The statute of Indiana, under which the St. Joseph County Savings Bank, of South Bend, Ind., a depository for postal savings funds, is incorporated, provides that the net profits of savings banks shall be distributed as dividends among the depositors but it does not authorize the payment of interest on deposits, and it is inconsistent with the laws of the State for savings banks to establish a class of depositors who shall receive both interest and dividends.

## DEPARTMENT OF JUSTICE,

*August 26, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of June 1, 1912, stating that the St. Joseph County Savings Bank, of South Bend, Ind., a depository for postal savings funds, is incorporated under a State law which provides that its net profits shall be distributed as dividends among its depositors, and that in its account current for the month of April, 1912, the bank has credited the board of trustees of the postal savings system with a dividend of \$2.

You wish to be advised whether the board of trustees is authorized to accept such dividends in addition to the  $2\frac{1}{2}$  per cent interest which the bank is required to pay on its deposits of postal savings funds under section 9 of the act of June 25, 1910 (36 Stat. 816), which provides that "the sums deposited shall bear interest at the rate of not less than  $2\frac{1}{4}$  per cent per annum, which rate shall be uniform throughout the United States and Territories thereof."

According to information received from the auditor of state of Indiana the St. Joseph County Savings Bank is incorporated under the provisions of an act to provide for the organization of savings banks, approved May 12, 1869 (Laws of 1869, special session, pp. 104-116), as amended. (Burns' Indiana Statutes, Revision of 1908, secs. 3348-3401.) Without going completely into the details of these statutes, I may say that they provide for the association of a certain number of persons for the purpose of organizing and managing a savings bank who are to conduct its affairs without, in general, any compensation, and who have power to adopt such by-laws, consistent with the laws of the State,

as they may think proper for transacting the business of the corporation. There is no capital stock, and the function of the bank is to receive deposits, make investment thereof, and make return of the profits therefrom to the depositors, less the expenses and the amount retained for reserve.

Section 3363 provides:

"Every savings bank shall be authorized to receive on deposit any sum or sums of money that may be offered for that purpose by any person or persons \* \* \* and to invest the same, and *declare, credit, and pay dividends thereon, as herein authorized, and not otherwise: \* \* \**"

Section 3364 provides:

"The sums so deposited shall be repaid to each depositor or his legal or authorized representatives, when required by him or by them, but at such times, *and with such dividends from profits*, and under such regulations as the board of trustees may prescribe, not inconsistent with the provisions of this act; \* \* \*"

By section 3365 deposits made by aliens, minors, or married women shall be repaid to the depositor "*with the dividends thereon.*"

Section 3376 provides:

"All savings banks shall make up their accounts semi-annually to the 1st days of January and July in each year; and all dividends or profits shall be divided, credited, or paid to the depositors on or before the 31st days of January and July, respectively."

Section 3381 provides:

"It shall be the duty of the trustees, after deducting the necessary expenses and the reserve for the surplus fund \* \* \* *to divide as nearly as may be practicable all the remaining profits, \* \* \* ratably among the depositors, except as hereinbefore provided.*"

(The provision alluded to at the end of this section merely refers to a permissible discrimination in dividends between large amounts and small amounts, and between deposits remaining a longer or shorter time.)

Section 3382 provides:

"Any residue of profits remaining undivided after compliance with the provisions of the last section, shall be di-

vided as often as once in three years among those who are depositors, when the distribution is made in such manner as the trustees shall direct, so as to be as equitable as practicable: \* \* \*."

A report to the auditor of state is provided for, and among the liabilities the report must state (sec. 3389) "the amount due depositors, including the dividend credited to them" for the 1st day of January, "stating such dividend as a separate item; and any other debts against or claims upon such savings bank which may become a charge upon its assets"; "the amount deposited and the amount withdrawn during the previous year; the whole amount of interest earned; the amount of expenses, specifying separately the amount paid for services and the amount of dividends credited to depositors, for the year preceding said 1st day of January."

The statute nowhere expressly authorizes savings banks to borrow money or to pay a fixed, stipulated rate of interest on deposits.

It is clear that this Indiana statute purports to authorize savings banks of the pure, original type, without any feature of the commercial bank. In such a pure savings bank the depositors, while creditors to the extent that they may require the payment of their deposits after demand made in accordance with the regulations of the bank, are nevertheless in a sense partners or stockholders in the institution, entitled to share in its profits on the one hand, but bound to bear the losses on the other. The status of depositors in such banks has been examined in many cases, of which the following are examples:

In *Bunnell v. The Collinsville Savings Society* (38 Conn. 203, 206) the court, in holding that the society was entitled to charge a loss, arising from depreciation in its investments, pro rata among the depositors, said:

"\* \* \* In the case of *Coite v. Society for Savings*, 32 Conn. 173, the court say that savings societies 'are in fact large, incorporated agencies for receiving and loaning money on account of their owners. They have no stock and no capital. \* \* \* They are merely places of deposit where money can be left to remain or be taken out at the



pleasure of the owner.' Their assets consist in loans of money made by them for the benefit of their depositors from whom the money was derived."

In reaching the same conclusion upon the same point, the Supreme Court of Massachusetts said in *Lewis v. Lynn Institution for Savings*, 148 Mass. 235, 243:

"It thus appears that a savings bank is an incorporated agency for receiving the moneys of depositors in small or moderate amounts, and investing them *merely for the use and benefit of the depositors*, \* \* \*.

"\* \* \* The fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. *This idea was, and still is, the corner stone of the whole system.* There is no corporation, with any purpose or possibility of profit to itself, independently of the depositors; but the latter are to share whatever profit may be made *in just proportion among themselves.* The corporation is a mere agency for managing the moneys of the depositors.

"\* \* \* There is no absolute promise to repay to any depositor the full amount of his deposit, at all events. *Such a promise to one depositor would imply that in case of loss he should be repaid out of the deposits of others. But the promise or undertaking of the corporation is the same to all.* There is no promise to pay one at the expense of others. The promise is, in effect, to pay each depositor in full, with his dividends, provided the assets are sufficient; and if they are not sufficient, then to pay to each one his proportionate share."

In *Osborn v. Byrne*, 43 Conn. 155, 160, where it was held that a depositor had no right if set off in the event of the insolvency of a savings bank, the court said:

"\* \* \* The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank. Disastrous investments affect each in the same way; and in case of insolvency all that a party who owns deposits in the one case or stock

in the other can claim, is his just proportion of what remains at the final winding up of the institutions."

In *Huntington v. Savings Bank*, 96 U. S. 388, 394, 395, where the Supreme Court of the United States had under consideration a statute not dissimilar in any material respect to the Indiana statute, the court, after stating that the corporation could exercise no powers except such as are expressly given or are necessarily implied, said:

" \* \* \* The title of the act incorporating it indicates its purpose; namely, an act to incorporate a national savings bank: and the only powers given to it were those we have mentioned, powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits *for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives.* \* \* \* This was the original idea of savings banks. \* \* \* Very many such exist in this country. \* \* \* Indeed, until recently, the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons, *the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security.*"

(The difference between the dividends paid to depositors in a savings bank of the pure type and interest paid on deposits is also pointed out by the court in *Cary v. The Savings Union*, 22 Wall. 38.)

In *Johnson v. Ward*, 2 Bradw. (Ill. App.) 261, 274, the court, referring to the description of a savings bank given by Mr. Grant in his work on banking, said:

" Manifestly a bank of the character thus described would be a mere trustee for the depositors, and its entire funds whether made up of the deposits themselves, or of the interest, gains, and accumulations thereof, *would be trust funds held for the benefit of the depositors. The profit to the depositor would be not a rate of interest fixed and determined by contract between him and the bank, but his distributive share of the whole net profits and accumulations of the institution, whatever they might be.* The depositors,

in a sense, would become members of the corporation, and the corporation and its officers would be mere trustees for their benefit."

There are other authorities giving the same description of a savings bank of the pure type and the relation of the depositors thereto, and the textbooks generally express the same view.

While I regret that I have been able to find no decisions of the Indiana courts construing the savings-bank act of that State in regard to the permissible legal relation of depositors therein (nor is there, as I am informed, any departmental decision on the subject), so that I am obliged to construe this statute without the aid of authoritative exposition, nevertheless I conceive it to be reasonably certain that a savings bank deriving its sole powers from an enactment of the character of this Indiana statute has no legal right to pay a stipulated, fixed rate of interest on deposits. In construing a statute relating to organizations of a quasi-public character like savings banks, it is important that they be not permitted to travel beyond the plain path marked out by the law creating them. Confessedly the Indiana statute gives no express power to savings banks to pay interest on deposits. More than that, the existence of such power seems contrary, if not to the express provisions of the act, at any rate to its whole spirit. They are given power to receive deposits, but, when once received and invested, the only power granted is to "declare, credit, and pay dividends thereon, *as herein authorized, and not otherwise.*" The manner in which dividends are "herein authorized" is that "it shall be the duty of the trustees \* \* \* to divide \* \* \* all the remaining profits *ratably among the depositors.*"

It is plain that the Indiana statute recognizes one kind of depositor and one only. Equality of treatment and the absence of commercial features are the distinguishing characteristics of this legislation. The equity of each depositor prevents a discrimination by which one shall be placed in a position of security while the others bear the burden of the losses of the institution. The most important idea in the scheme as portrayed in the Indiana statute is

that each depositor shall be equally interested in the association and shall be equally the coowner of its assets and the profits arising therefrom. It is true that the depositors are, in a certain sense, creditors, yet, under such legislation as that of Indiana, they are also, in a way, partners, who agree to combine their savings for investment in certain designated securities, sharing ratably in the profits therefrom, and it is not contemplated that the common stock shall be invested in what is, in effect, a loan to the depositors themselves with the payment of a stipulated rate of interest thereon.

It is true that certain decisions have the appearance of sustaining the right of savings banks to have depositors of a special class, not jointly interested in the association and, in some cases, receiving interest on their deposits, but these decisions will be found to be based either on the language of the charters which were construed to grant the right, or on the doctrine of estoppel as applied to *ultra vires* acts, and these decisions, in pointing out the entire distinction between depositors who receive a stipulated interest and those who do not, really sustain the conclusion I have stated above.

In *Cogswell v. The Bank*, 59 N. H. 43, 45, the Supreme Court of New Hampshire said:

"In the present case Davis and Fernald do not belong to the class of general depositors. Their deposits were special. They had no share or interest in the profits or earnings of the bank. The bank received their money and used it, and it went into the general fund. The transaction was in the nature of a loan. \* \* \* Whether they received interest upon their deposits is not material. If they were allowed interest, it was compensation, for the use of their money; and if none was allowed, the bank had the use of their money for taking care of it. In either case the money when deposited became the money of the bank, and they became its creditors."

"But it is contended that the receiving of deposits of this character, to be paid out on call, was not within the authorized business of the bank. Admitting this to be so, the bank, having received the money and converted it to

its use as a part of the general fund, must be held to account for it, and the claims of Davis and Fernald are debts to be paid in full."

In *Heironimus v. Sweeney*, 83 Md. 146, 156, the by-laws of a savings bank expressly provided for a class of depositors who received dividends and special depositors who received interest. The point was made that the bank had no power to pay interest on deposits, but the court held that after insolvency the bank was estopped to set up the defense of *ultra vires*. Of the former class of depositors the court said:

"\* \* \* They are in fact and substance the stockholders who own the assets of the company."

Of the latter:

"\* \* \* Here we see that money was loaned, to be repaid with interest when required by the lender."

The same distinction is emphasized in *Bank v. Evans*, 12 Col. App. 334, 340; in *Ackenhausen v. Savings Bank*, 110 Mich. 175, 179, 180; and in other cases.

There being this clear line of distinction between the status of depositors who receive interest and those who receive dividends, the Indiana statute, which recognizes only one kind of depositor and that the latter, can hardly be taken to authorize the former, and in my best judgment does not do so.

It is possible that the board of trustees of the Saint Joseph County Savings Bank have adopted a by-law providing for the payment of interest on deposits under the authority granted by section 3357 of the Indiana revision of 1908, in which case this by-law might be invoked as avoiding the conclusions reached above. But the by-laws so adopted must be "consistent with the laws of this State," and in my opinion the creation of a class of special depositors whose relation to the other depositors and to the bank would be entirely different from that of the general depositors, the only kind recognized in the Indiana statute, would not be consistent with the laws of that State.

It also seems clear that, even if the savings banks of Indiana have authority to pay interest on deposits, they have no power to establish a class of depositors who shall re-

ceive both interest and dividends. This would be to confuse established legal distinctions, to put one set of depositors in a position so advantageous with respect to the others as to go beyond any fair construction of the Indiana statutes.

These views render it unnecessary to consider whether the acceptance of the dividend mentioned would be inconsistent with the requirement of section 9 of the postal savings act that the rate of interest on deposits shall be uniform.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE POSTMASTER GENERAL.

---

NATURALIZATION OF ALIENS—DISTRICT COURT OF PORTO RICO—MIGUEL ROSES ARTAU AND ELIAS A. WOLFF.

A judgment of naturalization obtained in the District Court of Porto Rico under section 2165 of the Revised Statutes, which has since been repealed by the act of June 29, 1906 (34 Stat. 596), can not properly at this time be questioned on the ground that the court did not have jurisdiction over the naturalization of aliens.

DEPARTMENT OF JUSTICE,

*August 26, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo, requesting my opinion as to the legality of the naturalization of Miguel Roses Artau and Elias A. Wolff.

It appears that the former was born at Baleares Islands, Spain, August 9, 1874; emigrated November 11, 1900; resided between the years 1900 and 1912 in Porto Rico and the United States; and obtained naturalization as a citizen of the United States in the district court of the United States for Porto Rico at San Juan, August 2, 1906; and that the latter was born at St. Croix, Danish West Indies, August 26, 1862; emigrated to the United States May 10, 1881; resided in the United States from 1881 to 1884; and obtained naturalization as a citizen of the United States before the district court of Porto Rico at San Juan, April 17, 1903.

As both of these persons were naturalized prior to the time when the act of June 29, 1906 (34 Stat. 596), went into effect, their cases are governed by section 2165 of the Revised Statutes, which provides, in so far as relevant to this case, as follows:

"SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, *or a district or supreme court of the Territories*, \* \* \* two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States \* \* \*."

By the Porto Rican organic act of April 12, 1900 (31 Stat. 77, 84, sec. 34), it is provided in part as follows:

"SEC. 34. That Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' \* \* \* The district court for said district shall be called the district court of the United States for Porto Rico \* \* \* and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

Section 35 provides in part as follows:

"SEC. 35. That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; \* \* \*."

It appears that the district court of Porto Rico, construing section 2165, Revised Statutes, *supra*, in connection with the organic law establishing the court, has always held that the district courts of Porto Rico had jurisdiction, in proper cases, to naturalize aliens, either because said court was a circuit or district court of the United States, or because it was a district court of a Territory, within the meaning of these words in section 2165.

For example, in the case of *Louis A. Bonnet y Jaspard*, 2 P. R. Fed. Rep. 70, 73, Judge Rodey said:

"The United States attorney does not dispute that this court, under its jurisdiction as a circuit and district court of the United States, is vested with power, which, it is admitted, previous judges have several times exercised, to naturalize aliens \* \* \* if such aliens meet the requirements; \* \* \*."

As this jurisdiction has been assumed by the district court of Porto Rico without question, and as undoubtedly persons have applied for and received naturalization in good faith, relying upon the exercise of its jurisdiction, and as section 2165, Revised Statutes, has been repealed and the whole matter is now regulated by the act of June 29, 1906, it seems to me that it would be improper at this time to question the validity of the exercise of this jurisdiction by the district court of Porto Rico; and my opinion to that effect is confirmed by the case of *Kopel v. Bingham*, 211 U. S. 468, 476, where the Supreme Court, having under consideration section 5278, Revised Statutes, which provides for the extradition of criminals "whenever the executive authority of any State or Territory demands any person as a fugitive from justice," held that the statute applied to Porto Rico and said:

"It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory as is comprised in section 5278."

Without, therefore, going so far as to hold that the district court of Porto Rico was right in assuming jurisdiction to naturalize aliens under section 2165, Revised Statutes, yet there were evidently persuasive considerations to sustain its action, and I think, therefore, that its assumption of jurisdiction should be acquiesced in.

It is true that apparently neither of these aliens resided within the United States proper for five years prior to his naturalization. Without, however, passing upon the point whether residence in Porto Rico is residence within the



United States within the meaning of the naturalization law it is enough to say that, in my opinion, the judgment of the district court of Porto Rico can not be attacked collaterally upon this ground.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

The SECRETARY OF STATE.

---

TRANSFER OF PORTIONS OF LIBRARY OF CONGRESS  
LIGHTING AND HEATING PLANT TO BUREAU OF MINES.

The Superintendent of the Library Building and Grounds has no authority to transfer certain disused portions of the lighting and heating plant of the Library of Congress to the Bureau of Mines of the Department of the Interior.

DEPARTMENT OF JUSTICE,  
*September 24, 1912.*

SIR: I have the honor to reply to your letter of August 28, 1912, requesting an opinion as to the authority of the superintendent of the Congressional Library Building and Grounds to transfer to the Bureau of Mines of your department certain portions of the Library lighting and heating plant, which, together with the old Capitol plant, has become useless because of the construction of a central heating plant for the Capitol and Library Buildings.

It appears that by section 11 of the District of Columbia appropriation act approved June 26, 1912, the Superintendent of the *Capitol* Building and Grounds is authorized to "transfer apparatus, appliances, equipments, and supplies of any kind, discontinued or permanently out of service, to such other branches of the service of the United States, or District of Columbia, whenever, with the approval of the Secretary of the Interior, in his judgment the interests of the Government service may require it," a detailed report of all such transfers being required to be submitted to Congress in the annual report of the superintendent.

No such authority to transfer apparatus, equipment, and supplies "discontinued or permanently out of service" has

been conferred by Congress upon the superintendent of the *Library Building and Grounds*, but you say that that officer is willing to make the transfer of certain portions of the disused library heating and lighting plant "provided the same can be done lawfully."

There being no statute specifically prohibiting or authorizing such a transfer, the authority of the superintendent of the *Library Building and Grounds* to make it must be entirely a matter of implication from the powers devolved upon him by law. The act of February 19, 1897 (29 Stat. 545), impliedly makes him the custodian of the property referred to, but that carries with it no authority to transfer such property to some other branch or establishment of the Government, even if its use for heating and lighting the library has been discontinued. On the contrary, his duties as custodian impliedly prohibits him from transferring the possession of the property committed to his care to some one else.

Doubtless the transfer of the property in question to the Bureau of Mines of your department would be to the pecuniary advantage of the Government. Presumably it ought to be made now, if it is to be made at all. It may also be that if the transfer were made it would meet with the approval of Congress. But, as I view it, the custodian of the property has no legal authority to make such transfer, and if he does so, he necessarily runs the risk of criticism and discipline for his unauthorized action. It is for Congress, under its constitutional grant with respect to the regulation and disposition of the territory and other property of the United States, to say what shall be done with the apparatus in question. Mere custodians under it have no such authority.

It is to be observed that in authorizing the transfer of disused property from the Capitol to other branches of the service of the United States, as well as the District of Columbia, Congress has safeguarded the exercise of the power by the Superintendent of the Capitol Building and Grounds by requiring the approval of the Secretary of the Interior, and also by requiring a detailed report to be made of all such transfers by the superintendent. If a

transfer were to be authorized in the present case, Congress might think like or further restrictions necessary. It is also to be observed that any transfer of this kind operates to increase the appropriations for the branch of the Government to which the transfer is made, something that Congress could not have had in mind when making such appropriations.

Respectfully,

WILLIAM R. HARR,  
*Assistant Attorney General.*

Approved:

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

---

DAILY NEWSPAPERS—FILING STATEMENT OF PAID  
CIRCULATION.

The statement of daily newspapers required to be filed by section 2 of the Post Office appropriation act of August 24, 1912, should include the average of the number of copies of each issue of such publication sold or distributed to all persons who have subscribed—that is, have agreed to take and pay for one or more copies of the publications for a definite period of time—and have paid for such subscriptions, and it is immaterial whether or not the subscriptions are individual or in bulk.

The provision covers the number of copies of such publications distributed to such subscribers by any means, whether by the mails or otherwise.

DEPARTMENT OF JUSTICE,

*September 25, 1912.*

SIR: In your letter of September 14 you call my attention to certain provisions of section 2 of the act entitled "An act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1913, and for other purposes" (37 Stat. 553), approved August 24, 1912, which makes it the duty of the editor, publisher, business manager, or owner of every daily newspaper to file with the Postmaster General and the postmaster at the office at which such publication is entered, not later than the 1st day of April and the 1st day of October in each year, on blanks furnished by the Post Office Department, a sworn statement which shall include—

“The average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months \* \* \*”

a copy of which sworn statement shall be published in the second issue of such newspaper printed next after the filing of such statement, and which publication, it is enacted—

“Shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.”

You ask my opinion as to—

“Whether or not this statement shall be limited to paid individual subscriptions, or shall include purchases in bulk by news agents or others for redistribution; also whether in your opinion the provision covers paid circulation of daily newspapers not distributed through the mails?”

The provision is highly penal in its nature, as a consequence of failure to comply with it is punished by denying to the publication the privilege of the mails, not merely the privilege of being carried in the mails as second-class mail matter, but the privilege of being carried in the mails at all. Being therefore in derogation of common right, the provision should not be construed to embrace anything more than falls clearly within its terms, and by those terms the requirements of the statement are limited to—

“The average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months.”

The verb “to subscribe” has a definite meaning in both a legal and a popular sense, and is defined as—

“To promise a certain sum verbally, or by signing an agreement; specifically, to undertake to pay a definite amount, in a manner or on conditions agreed upon, for a special purpose; as to subscribe for a newspaper, or for a book (which may be delivered in installments) \* \* \*. In law the word implies that the agreement is made in writing.” (Century Dictionary and Cyclopedia.)

Or again:

“To engage oneself, or to give one’s formal consent, by signing any pledge, contract, deed, document, or written statement of any kind \* \* \*; to pledge oneself, especially by writing, to pay a given amount of money. To authorize the entry of a name on the list of those who agree to receive and pay for an article, as a periodical, an engraving, or a book sold by securing purchasers in advance of delivery.” (Standard Dictionary.)

“To become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber.” (*Ashton v. Stoy*, 96 Iowa, 197, 201, 64 N. W. Rep. 804.)

Thus, a subscription to the capital stock of a corporation implies an agreement to take and pay for it. But if the steps taken, although informal, are treated by the corporation and the subscriber as sufficient, they will be treated as binding. (*Crissey v. Cook*, 67 Kansas, 20, 23; *Nugent v. Supervisors*, 19 Wall. 241.)

The distinction between circulation among paid subscribers and the casual or uncertain distribution to other purchasers has been recognized by the Post Office Department in its Regulations (edition of 1907, sec. 469), where, after pointing out that the news agent’s right to mail second-class publications at the pound rate of postage, under the provisions of the act of March 3, 1885 (chap 342), extends only to actual subscribers thereto and to other news agents for sale, the Regulations state that—

“Actual subscribers to second-class publications are persons who personally order the same for a period of at least three consecutive issues.”

Subscribers, therefore, are clearly those who have by agreement undertaken to receive and pay for the publication for some specified period of time, as distinguished from casual purchasers who come under no obligation to take and pay for the publication in advance of its delivery. It is immaterial whether this subscription is for one or many copies. Subscriptions may be direct or through an agent, but the delivery to agents for sale or distribution,

unaccompanied by agreement to pay for any definite number would not be included within the term "subscribers."

With respect to publications seeking the privilege of the second-class mail rate, as shown below, the Postmaster General is required to determine certain matters of fact upon which depends the enjoyment of that privilege, among which is the question whether or not there is "a legitimate list of subscribers" to the publication. (See 20 Op., 384.) But the clause in the act of 1912 under consideration devolves no such duty upon you. It makes it the duty of the editor, publisher, business manager, or owner to file a sworn statement containing among other things the matters above specified, on blanks furnished by the Post Office Department. These blanks should call for the information required by the statute—no more, no less. If the statement is not filed as required by law, or if the information required is not what the statute demands, the publication may be denied the privilege of the mail if it fail to comply with the provisions of the law within 10 days after notice by registered letter of such failure. While the statute does not expressly make it the duty of the Postmaster General to give such notice, yet I think it may be fairly implied from its provisions that it would become his duty to give the notice in all cases where (1) the editor, etc., of any publication of whose existence the Postmaster General has knowledge shall fail to file the statement required by law; or (2) the statement on its face shall not conform to the statute; or (3) information shall be laid before the Postmaster General which satisfies him that the information furnished in the statement is inaccurate or untrue. In either event, if the privileges of the mail should be denied because of failure to comply with the statute, the burden would be on the Government to establish such failure.

The provisions of the statute under consideration should not be confused with those of the statutes relating to second-class mail matter, and they in no respect limit or affect the power of the Postmaster General to require full information to be furnished to him to enable him to determine whether or not a given publication is entitled to the privileges of the second-class mail rate.

The act of March 3, 1879 (R. S. First Supp. p. 246), provides that mailable matter of the second class—

“ Shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.”

Among the conditions which by section 14 must be met before a publication is admitted to the privilege of the second class are those of subdivision fourth, namely:

“ It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided, however,* That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.”

The act of August 24, 1912, extends the benefits of the second-class mail rate to certain publications to which it has not heretofore been granted. But the provisions of that paragraph, which are found under the head of “ Office of the Third Assistant Postmaster General,” do not otherwise conflict with the provisions of the act of March 3, 1879, or the amendment to it approved March 3, 1885 (chap. 342), except that with respect to some of the publications issued by or under the auspices of benevolent or fraternal societies or orders, or trades unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, they are limited—

“ To copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than fifty per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and ten per centum of such circulation as sample copies: *Provided further,* That when such members pay therefor as a part of their dues or assessments, individual subscriptions or receipts shall not be required \* \* \*.”

Independently of this amending act, in order that the Postmaster General may determine whether or not a publication applying to be admitted to the second class has a

legitimate list of subscribers, and is not designed primarily for advertising purposes, or free circulation, or for circulation at nominal rates, the Postmaster General is entitled to require full and complete statements showing the character of the business of the publication, and by section 436 of the Regulations (edition 1902) he has required postmasters to secure satisfactory evidence that publications so offered for entry have—

“A legitimate list of subscribers, approximating 50 per cent of the number of copies regularly issued and circulated, by mail or otherwise, made up not of persons whose names are furnished by advertisers or by others interested in the circulation of the publication, but of those who voluntarily seek it and pay for it with their own money, although this rule is not intended to interfere with any genuine case where one person subscribes for a definite period of several issues for a limited number of copies for another.”

And by section 438 the postmasters are directed to require the proprietor or duly authorized representative, on applying for second-class mail privilege, to furnish detailed information of a character deemed requisite by the Postmaster General to enable him to determine whether or not the publication falls within the requirements of the acts of Congress. The right of the Postmaster General to exact this information is in no respect impaired or affected by the provisions of the statute under consideration. Those provisions are inserted as a part of the act of 1912, which is apparently designed to insure publicity as to the ownership and control of the publication. This particular clause was inserted by amendment just before the passage of the act, and bears no very ascertainable relation to the subject matter of the paragraph in which it was inserted. It is a provision of statute law which should be complied with to the extent which its language requires, but it should not be extended beyond that language. (See *Payne v. National Railway Pub. Co.* 20 App. D. C. 581; *People ex rel. Opdyke v. Brennan*, 39 Barbour 651.)

Answering specifically your inquiry, therefore, in my opinion, (1) it is immaterial whether or not the subscrip-



tions are individual or in bulk. The statement should include the average of the number of copies of each issue of such publication sold or distributed to all persons who have subscribed; that is, have agreed to take and pay for one or more copies of the publications for a definite period of time, and have paid for such subscriptions; and (2) in my opinion the provision covers the number of copies of such publication distributed to such paid subscribers by any means, whether by the mails or otherwise.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

---

LIBRARY OF CONGRESS—ASSISTANT IN DIVISION FOR  
THE BLIND.

The provision in the legislative, executive, and judicial appropriation act of August 23, 1912, for an assistant in the division for the blind in the Library of Congress, creates a particular position but does not designate the particular person who is to fill it; the phrase "formerly in free Public Library" is merely descriptive of the character of the duties of the position created.

DEPARTMENT OF JUSTICE,

*September 30, 1912.*

SIR: I have Mr. Thompson's letter of the 20th instant, inclosing one from the Librarian of Congress, stating that the legislative, executive, and judicial appropriation act of August 23, 1912 (37 Stat. 360), contains among other provisions for the Library of Congress the following:

"Reading rooms (including evening service) and special collections: Superintendent of reading room, \$3,000; assistants—two at \$1,800 each; five at \$1,200 each, including one in division for the blind (formerly in free Public Library)"

and asking whether this clause merely provides for the appointment of an attendant in the reading room whose duties shall be performed in the division for the blind, or whether it also designates the particular person who is to fill it.

It appears that the same act for the fiscal year 1911 provided for an assistant in the reading room for the blind (36 Stat. 479), but that this assistant was omitted from the act for the year 1912 (36 Stat. 1181); that the District of Columbia appropriation act for the year 1912 contained a provision for such an assistant in the free Public Library at Washington (36 Stat. 972), but that this appropriation was omitted from the act of June 26, 1912 (37 Stat. 139), for the fiscal year 1913.

From the librarian's letter it appears that the person formerly employed in the reading room for the blind in the Congressional Library was employed in the same work in the Free Library at Washington during the fiscal year ending July 1, 1912, on which last day her connection with the service ceased, because her position had been abolished. Apparently, therefore, from July 1, 1912, until August 23, 1912, there was no appropriation for work of this character in either the Library of Congress or the free Public Library at Washington.

The question is then, whether the present appropriation act of August 23, 1912, which re-creates a particular office in the Library of Congress, also appoints a certain individual thereto.

It is a fundamental principle of our Government that appointments to executive positions are to be made by the executive power; but without passing upon the question of the power of Congress to make an appointment of this character by legislation, I am clearly of the opinion that the language of the present act "formerly in free Public Library" is merely descriptive of the character of the duties of the position created, and is not a legislative declaration that an individual, who nearly two months ago had been employed by the District of Columbia in similar work, was to be appointed by the Librarian of Congress in the new position.

Respectfully,

JESSE C. ADKINS,  
*Acting Attorney General.*

THE PRESIDENT.

**EIGHT-HOUR LAW—WORK CONTEMPLATED BY THE CONTRACT—PROJECTILES—SMOKELESS POWDER.**

The eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract. The words "work contemplated by the contract" include the work directly and proximately in view in the contract as specifically appropriated to and destined for the Government use.

The word "supplies" and the phrase "such materials or articles as may usually be bought in open market" are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration.

Contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction, but only the work done in assembling the parts, treating the forging or casting, and machining the projectiles would be "work contemplated by the contract," unless the casting and other parts were manufactured solely and exclusively for the purpose of making the projectiles.

Smokeless powder is manufactured ordinarily by the Government, and hence contracts for the purchase thereof are subject to the eight-hour restriction.

DEPARTMENT OF JUSTICE,  
*October 3, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 14th ultimo, in which you request my opinion as to the proper construction of the act of Congress entitled "An act limiting the hours of daily service of laborers and mechanics employed upon work done for the United States, or for any Territory, or for the District of Columbia, and for other purposes," approved June 19, 1912 (37 Stat. 137), as affecting certain questions arising in the administration of your Department.

The portions of said act pertinent to your inquiries are as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers*

or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; \* \* \*

“SEC. 2. That nothing in this act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this act \* \* \*.”

1. Your first question is as to whether the provisions of section 1 of said act contemplate that laborers and mechanics affected thereby shall not be required or permitted to work more than 8 hours a day, or only that they shall not be required or permitted to labor more than 8 hours a day on work contemplated by the contract. For example, can a mechanic in the employ of a contractor or subcontractor, after working 8 hours in one calendar day on work contemplated by the contract, be required or permitted, without violation of the 8-hour restrictive prohibition, to labor for a further period in that day on work that his employer may be doing for private individuals, or for the Government under an-

other contract? And similarly, if the work allotted to such mechanic requires him in any one day to work upon material identified as destined for the Government under a contract and also upon material destined for private purchasers, then, to avoid a violation of the restrictive provision, is his entire day's work, or only the sum of the several *periods* during which he works on material for the Government, to be limited to 8 hours?

The answer to your question depends upon the proper construction to be given to the following language in section 1 of the act, namely, "in the employ of the contractor or any subcontractor contracting for any part of *said work contemplated*" and "*upon such work.*"

In the bill which passed the House of Representatives of the Fifty-seventh Congress (H. R. 3076) the first phrase quoted above was contained, but the latter—namely, "upon such work"—was not. The Senate Committee on Education and Labor of the Fifty-seventh Congress, in adding the latter words to the House bill, submitted the following report (S. Rept. No. 2321, 57th Cong., 2d sess., p. 9) :

"The advocates of the pending bill believe that this bill, which by its title limits to 8 hours a laborer's *work done for the United States*, reaches other laborers upon commercial work if the contractor is on the same day engaged upon Government work and work upon private contracts. The committee are unanimously of the opinion that the House bill means no more than its words import. It says the contract shall contain a provision that—

"*No laborer doing any part of the work contemplated by the contract \* \* \* shall be required or permitted to work more than 8 hours in any one calendar day.*"

"The contract is for Government work. Upon *no part of that work* shall a laborer be permitted to work more than 8 hours. Therefore the committee have added the words implied by the House bill '*upon such work.*'

"They are unanimous in the opinion that the provision that no mechanic should be required or permitted to work more than 8 hours in any one day means either one of two things: First, by a strained construction that a citizen should not be permitted to work more than 8 hours out of

24 anywhere, even at his house or in his garden, if he has already worked 8 hours upon a Government contract. If it means this, such a denial of personal liberty would be unconstitutional, such a law would be impossible and absurd. Secondly, the other meaning is that no mechanic shall be required or permitted to work under a Government contract more than 8 hours in one day *upon such work*.

“That is, that the House bill would write into every Government contract a provision that no mechanic *doing any part of the work contemplated by the contract* shall be required or permitted to work more than 8 hours in any one day *upon such work*; namely, *the work contemplated by the contract*. The committee unanimously believe that the latter construction is the necessary meaning of the House bill, and a majority of the committee therefore have inserted the words ‘upon such work.’ Thus amended, a majority of the committee favor reporting this bill to the Senate.

“It may be profitable to quote the words of a member of this committee when discussing this amendment to this part of the bill.

“‘The amendment “upon such work.” after the word “day,” on page 2, in line 2, was inserted not for the purpose of changing the texture of the bill as grammatically and legally construed, and as your committee is of opinion the courts would hold. It was done simply to make obvious what in our conception is the true meaning of the bill as it passed the other House. If it were designed by the bill to prohibit the laborer or mechanic from himself engaging in any other kind of work during the 16 hours of the day in which he is not occupied on contract or sub-contract work for the Government, it would infringe his personal liberty to work in the construction of his own house, the cultivation of his own garden, or doing or pursuing for any of those 16 hours any self-imposed task which he might choose to exercise for the benefit of himself, his wife, or his children. As if we were to prohibit him from thus employing his own time for his own benefit, it would follow that we should impose upon him a penalty for so doing. And thus the act assumed to be for his benefit might

become an engine of extreme oppression and the inflictment of infinite annoyance and damage upon him. It would also be obviously an unconstitutional infringement of his personal liberty, as well as tyrannous subversion of the privileges to which he is entitled.' ”

If the language of the act now under consideration were given its broadest construction, it would not, of course, cover labor performed by an employee for himself, and the decisions in *Ellis v. United States* (206 U. S. 246), and the Opinion of Justices (94 N. E. Rep. 1043 [Mass.]), which sustain the constitutionality of legislation such as this, clearly imply that Congress has the power to require the establishment of a complete 8-hour day on the part of those persons who choose to enter into contracts with the United States. Nevertheless, it is clear that Congress inserted the words “upon such work” into this legislation for the purpose of limiting its scope in some way and of drawing a line on one side of which should fall work within the 8-hour restriction and on the other side some character of work which was not within said restriction. The only line which can be thus drawn conforming to the plain natural meaning of the words used is that suggested by the committee of the Senate; namely, that the 8-hour stipulation and restriction applies only to work done for the Government and not to work done for private individuals. This view of the statute is emphasized by the provision that “every such contract shall stipulate a penalty for each violation of such provision in such contract of \$5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than 8 hours *upon said work*.” Clearly, no penalty could be collected under the authority of this provision if the laborer or mechanic were required or permitted to labor more than 8 hours a day upon some other work than that contemplated by the contract.

2. Your second question involves the proper construction of “any part of the work contemplated by the contract,” and “for any part of said work contemplated,” in section 1 aforesaid. You state that in the ordinary conduct of the business of the contractor work may be done that is

applicable equally to the prosecution of Government contracts within the scope of the act and private contracts; such, for instance, as the generating of power for his plant, the operating of facilities for handling materials, etc. Work may also be done in the way of producing or preparing raw materials finally available for a variety of purposes, but before the fashioning of the specific thing is begun not susceptible of identification as destined for the Government. For example, a contractor for the construction of heavy guns operates a large steel plant and manufactures a great number of steel products for the general market. Through a long process, involving the handling and smelting of ore and the treatment of pig iron, steel is produced, which in this stage as a raw product can be made into cannon for the Government or articles for other patrons. You request my opinion as to whether the words in the act "any part of the work contemplated by the contract," include work of the kind referred to, necessary for the general operation of the plant, or done in the production or preparation of material which, until segregated for employment on Government work, is indistinguishable from that destined for general commercial purposes; or whether they include the work only from the point where specific material is identified as intended for use in the production of the thing contracted for by the Government.

This general subject was discussed in the debates in the House on the present bill. (See pp. 339, 340, 341, Cong. Rec., 62d Cong., 2d sess.) For example:

"Mr. CANNON. \* \* \* but I wanted to see how far the law would apply in the production of armor and armor plate. In the first place, it is made of iron. In the second place, the iron is produced from iron ore.

"That involves the labor of producing the ore; then the coal or the coke, or perchance the charcoal; that involves labor that goes into the armor plate. Then the furnace in which the armor plate is constructed, so far as the furnace is used, and the furnace itself is built of fire brick. Now, what I want to ask is whether, in all the factors that enter into the production of armor plate, the 8-hour provision as



proposed by the bill would be subject to the control of the 8-hour labor provision?

"Mr. WILSON of Pennsylvania. Mr. Speaker, what the committee had in mind in the amendment which they offer was the actual assembling and making at the place of manufacture of the armor plate and not the carrying back to the point of production of the constituent elements in the making of the armor plate.

"Mr. CANNON. The gentleman is satisfied that that would be the construction?

"Mr. WILSON of Pennsylvania. I think so.

"Mr. CANNON. \* \* \* but I judge from the remarks of the gentleman that it is not proposed by this legislation to do anything more than to regulate the 8-hour labor where the materials are assembled in the actual production of armor plate.

"Mr. WILSON of Pennsylvania. That is what is intended.

"Mr. CANNON. Now, I will ask the gentleman in perfect good faith, because I am in sympathy with the shortening of hours of labor wherever it can be done in justice to the great mass of all the people—here is a contract for a public building which involves the use of brick, of stone, of steel structure ordinarily. Now, under the gentleman's bill, suppose the steel beams were required, or suppose slate or tile is required to cover the building. A man takes a contract for the building and lets the contract for the brick or the steel to somebody who works 10-hour labor or 9-hour labor. Would such production be prohibited under the terms of this bill unless the material was produced by 8-hour labor?

"Mr. WILSON of Pennsylvania. I presume that a part of it might come within the provisions of this bill and a part would not. The things being bought in the open market would not come within it.

"Mr. CANNON. Now, just at this point. The bill reads 'except armor and armor plate.' Then this language occurs, 'whether made and forming a part of the specifications or not.' Would not this bill, if enacted, as to the matters I refer to, brick, stone, and steel beams, and so forth, be excepted from this act by these provisions?

“**Mr. WILSON** of Pennsylvania. The things the gentleman has enumerated would be excepted from the act, because they are materials that can usually be bought in the open market.

“**Mr. MADDEN.** If the gentleman will pardon me, I presume that what the gentleman intends to have the bill provide is, that if stone is manufactured after it is produced from the quarry that would be material which could not be bought in the open market, and the manufacture of such stone would be required to be made by 8-hour labor. Is not that correct?

“**Mr. WILSON** of Pennsylvania. No; it would not be required to be made by union labor or nonunion, but made under the 8-hour work day.

\* \* \* \* \*

“**Mr. DAVIDSON.** I want to ask the gentleman whether material that was constructed in accordance with specifications furnished would be construed as being in the open market. For instance, referring to cut stone for a building. Take a public building to be treated with doors and windows. Door and window sashes are articles to be bought in the open market, and yet for that particular building the doors might have to be of certain dimensions. The window sash might have to be of certain dimensions and there might not be in the open market those dimensions carried in the general stock, but they would have to be manufactured to fit those particular places. Now, if that were the case and contract was issued with specifications, would that come under this 8-hour law?

“**Mr. WILSON** of Pennsylvania. Those would have to be things not usually bought in the open market. Where things usually bought in the open market conform to specifications——

“**Mr. DAVIDSON.** If the article was a stock article which could be bought upon the open market, but if it required that article to be of different dimensions, then, you see, it could not be bought in the open market.

“**Mr. WILSON** of Pennsylvania. If it were something that could not be usually bought in the open market, then the work in making that article would come under the provi-

sions of this act; but if it could be usually bought in the open market, then it would not be required to conform to this act, but in the very nature of the exception there is some latitude that must be allowed to administration."

There is further debate to the same effect, but these quotations are sufficient to show that Congress intended to draw some line in the manufacture or production of material or articles for the Government beyond which the 8-hour provision should not extend. In an extreme sense a contract for the manufacture of an article "contemplates" the entire process from the obtaining of the raw material to the end, and "requires or involves" a successive employment of labor therein from the beginning to the end. But the natural and practical view is that which, as suggested by the debate quoted, confines the 8-hour restriction to labor upon the work directly and proximately in view in the contract.

The statute provides that "any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation, and the day of such violation \* \* \*."

It appears, therefore, that the law places upon the Government the burden of investigating and discovering violations of the terms thereof, and it is clear that, unless the words "work contemplated by the contract" be construed in the manner I have just stated, the law could not be practically enforced. It is impossible in the nature of things for the Government to oversee the enforcement of the 8-hour law in all the ramifications of the industries which go to the production of an article contracted for by the Government. It follows, therefore, that the words "work contemplated by the contract" must be construed in a manner which will enable the law to be practically observed and enforced, and the construction which naturally suggests itself is that the work contemplated is the work directly

and proximately in view in the contract as specifically appropriated to and destined for the Government use. To determine what class of work is covered by this definition must be largely a matter of administration, but, in my opinion, the general work done by the contractor or a subcontractor in his plant, which is applicable and destined to the fulfillment of his contracts with all persons generally, does not fall within the law. Only that portion of the work which can be regarded as directed specifically to the fulfillment of the Government contract, and to nothing else, falls within the provisions of the act.

3. Your third question is as to the meaning of the words "supplies \* \* \* whether manufactured to conform to particular specifications or not" and "such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not," in section 2 of the act, and more specifically, whether projectiles, or shells, and smokeless powder fall within the class referred to.

The two phrases above quoted appear to be practically synonymous. "Supplies" are things which are had in store or in stock. Such articles are, of course, usually sold in the open market, while materials or articles which are usually to be bought in the open market are necessarily, as a rule, those which are had in stock or in store. Generally speaking, whether a particular article or material falls within the above exception in section 2 is a matter of administration, and the decision of an administrative officer thereon would certainly not be lightly overruled.

As to the projectiles or shells, you make the following statement:

"The Government purchases projectiles or shell in large numbers. None are manufactured by either the Navy or the War Department at the present time, with the possible exception of a few 1-pounder target shell manufactured by the Ordnance Department of the Army for training purposes. The shell are manufactured by a large number of companies, many of which carry on the work in connection with their regular commercial business. There is no market

for them in this country except to the Government, and they are not usually kept in stock, but are furnished only in accordance with particular specifications under special contracts let after opportunity for competitive bidding. In these respects, however, they are not different from armor and armor plate, which are manufactured by but three companies, and which the Congress, by excepting them therefrom, would seem to have considered to be among 'such materials or articles as may usually be bought in open market.' Armor-piercing shell are made ordinarily by the crucible process, while target shell are cast. In a sense a projectile is simply a treated steel forging or casting conforming to certain prescribed dimensions. It has certain attachments, such as rotating bands, wind shields, and caps, all of which, including the forging or casting itself, are procurable in the open market, the service required of the contractor when the parts are so obtained being to assemble, treat, and finally machine the projectile. Hence, although in a measure a special article, it is, as delivered to the Government, nothing more than a finished treated forging or casting that must be fused and loaded with explosive to place it in an effective condition for service."

This statement seems to carry its own answer. Since there is no market for these shells in this country except to the United States Government, they necessarily do not fall within the exception of articles usually to be bought in the open market. In my opinion, however, under the facts stated by you in regard to the manufacture of projectiles, only the work done in assembling the parts, treating the forging or casting, and machining the projectile would be "work contemplated by the contract," as defined in my answer to your second question, unless the casting and other parts were manufactured solely and exclusively for the purpose of making the projectile.

As to smokeless powder, you state:

"All the smokeless powder used by the Government, except that which it itself manufactures, is obtained from the Du Pont Powder Company. Military smokeless powder is not an ordinary supply, material, or article such as can usually be bought without special contract or without being

manufactured specially for the Government. Up to a certain point the manufacture of military smokeless powder by the company is 'commingled with the manufacture of commercial smokeless powder,' but beyond that point, which differs somewhat at the three plants of the company where Government powder is made, the processes in the manufacture of military smokeless powder are differentiated and are separate from those involved in the completion of powder for commercial purposes \* \* \*."

From this statement it appears that military smokeless powder is manufactured through a large part of the process by the same methods as commercial smokeless powder, the difference beginning at the point of dehydration, and that commercial smokeless powder can be usually bought in the open market. If, therefore, military smokeless powder be simply a form of commercial smokeless powder, so that it can be fairly said that military smokeless powder is nothing more than commercial smokeless powder manufactured to conform to particular specifications, it would, in my opinion, fall within the exceptions. If, however, military smokeless powder be a distinct species of powder, then, since it can not be bought as such in the open market, it would not fall within the exception. Whether it is the one or the other appears to be a question of fact which you should determine for yourself.

In regard, however, to smokeless powder another serious question appears to be involved. You state that the Government maintains two establishments for the manufacture of smokeless powder; that this manufacture is in no sense experimental or spasmodic, but is carried on as a well-established Government industry; and that the product of these two plants represents about 30 per cent of the total amount of powder required by the Government during a year. Upon these circumstances the case of the smokeless powder appears to fall within the proviso to the exceptions in section 2, which reads:

*"Provided, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of*

the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this act."

In my opinion to the Secretary of War of August 19, 1912 (29 Op. 513), I said in reference to this proviso that it "must be construed as referring to work which, up to the time of the making of the contract therefor, has ordinarily been performed by the Government, and not merely occasionally or to a limited extent."

I can not regard a manufacture which continuously turns out 30 per cent of the Government's requirements as being occasional or limited. If this be not a case intended to be covered by the proviso, I can hardly conceive of a case which would. The manufacture of powder is expressly referred to in the debates in the House as being one of the things which the proviso was intended to cover, and it seems to be a case similar in all respects to the construction of battleships to which Congress has steadily of late manifested a purpose to extend the 8-hour day.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

POSTAL-SAVINGS SYSTEM—IMPROVEMENT BONDS OF  
WEST END AND TUSCALOOSA, ALA.

Certain improvement bonds of the city of Tuscaloosa, Ala., which purport to bind that city without any reservation, are public bonds supported by the taxing power within the meaning of section 9 of the postal-savings depositories act of June 25, 1910 (36 Stat. 816). Certain other improvement bonds of the city of West End, Ala., which are not payable out of the general taxes of the municipality, but merely out of a special fund, are not acceptable as security for postal-savings deposits.

DEPARTMENT OF JUSTICE,  
*October 3, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 20th ultimo, in which you state that the Treasurer of the United States has held that certain improvement bonds issued by the cities of West End and

Tuscaloosa, Ala., are not acceptable as security for deposits of postal-savings funds on the ground that they are payable in each case from assessments levied against property in only a portion of the city. You request my opinion as to whether the bonds, copies of which you inclose, are "public bonds or other securities, supported by the taxing power," within the meaning of section 9 of the act of June 25, 1910 (36 Stat. 816).

As to the bonds of the city of Tuscaloosa, I assume that this city has a population of 6,000 or more. (*Ryan v. The Mayor, etc., of Tuscaloosa*, 155 Ala. 479.) Such being the case, the constitution of Alabama of 1901 provides, in section 225:

" \* \* \* All towns and cities having a population of six thousand or more, \* \* \* are hereby authorized to become indebted in an amount including present indebtedness, not exceeding seven per centum of the assessed valuation of the property therein, provided that there shall not be included in the limitation of the indebtedness of such last described cities and towns the following classes of indebtedness, to wit: \* \* \* bonds or other obligations already issued, or which may hereafter be issued for the purpose of acquiring, providing or constructing school houses, water works and sewers; and obligations incurred and bonds issued for street or sidewalk improvements, where the cost of the same, in whole or in part, is to be assessed against the property abutting said improvements; \* \* \* "

Section 1359 of the Code of Alabama of 1907, as amended by the act of April 12, 1911 (Laws of Alabama, 1911, p. 371), grants power to all the cities and towns of the State to contract for and to construct or cause to be constructed both main and lateral sewers, and section 1409 of the code of 1907 authorizes the cities and towns to issue bonds, within the limitations prescribed by the constitution, for the purpose of providing funds to pay the cost of any improvement authorized to be made under the provisions of section 1359 aforesaid. Section 1410 of the code provides that the said bonds shall be negotiable and payable to bearer and may be payable in lawful money, or gold coin



of the United States, as the council may prescribe; that they shall bear interest at not to exceed 8 per cent, payable annually or semiannually, shall be issued under the corporate seal of the city or town, and shall be signed by the mayor and the treasurer thereof; that they shall be payable in 10 years from their date, but may be payable at the option of the city or town at any interest period; but that in the event the city or town should elect to pay off any such bond before maturity it shall pay a prescribed bonus to the holder thereof. Subsequent sections of the code provide for the collection of assessments on the abutting property and separation of the proceeds of such assessments from the other revenues of the city or town, and their application to the payment of the bonds issued on account of that particular improvement; but there is no provision in the law to the effect that the bonds are payable only out of the amount realized from assessments.

On May 4, 1911, the city council of the city of Tuscaloosa passed an ordinance providing for the issuance of bonds to pay for the construction of certain feeder or lateral sewers; that the bonds were to be issued under the provisions of sections 1409 and 1410 of the Code of Alabama of 1907; that the bonds should be payable, both principal and interest, in gold coin of the United States; that they should be signed by the mayor and treasurer of the city of Tuscaloosa and sealed with the corporate seal thereof, and that "the faith and credit and property of the city of Tuscaloosa is hereby pledged to the punctual payment of the said bonds and coupons as the same mature." Section 5 of the ordinance provides that the money derived from the assessments should be kept separate and apart from the other revenues of the city and applied to the payment of the bonds thereby authorized, but there is no provision in the ordinance that the bonds are to be payable solely out of this assessment fund.

The bonds issued under the authority of the aforesaid provisions of the Code of Alabama and of the ordinance of the city of Tuscaloosa, according to the copy submitted by you, purport to bind the city of Tuscaloosa without any reservation, are signed by the mayor and treasurer of said city, and sealed with the corporate seal.

Under these circumstances the case falls directly within the opinion of the Attorney General in the case of the bonds of the city of Portland, Oreg. (29 Op. 335.) I therefore have the honor to advise you that the bonds of the city of Tuscaloosa to which you refer are "public bonds or other securities, supported by the taxing power" within the meaning of section 9 of the act of June 25, 1910. I do not, of course, attempt to pass upon their validity in any other respect whatsoever.

As to the bonds of the city of West End, a different condition of affairs is apparent. While it may be that the city of West End could issue bonds, under the authority of the provisions of the Code of Alabama hereinbefore referred to, the fact is that the bond of which you submit a copy does not purport to bind the city of West End absolutely. It is expressly stated therein that—

"This bond is issued to anticipate the collection of the deferred installments of a special assessment levied by the city of West End, Alabama, on the 24th day of October, 1907, for the purpose of paying for the construction of sanitary sewers under improvement Ordinance Number Four (4) of said city of West End.

"And this bond and the interest thereon are payable solely out of said installments of said assessments, which have been transferred and assigned for the benefit of the holder hereof, by an ordinance duly passed by the mayor and aldermen of said city of West End on the 3rd day of December, 1907."

These bonds, therefore, are evidently not payable out of the general taxes of the municipality, but merely out of a special fund, and therefore the case is governed by the opinion of the Attorney General on the public-building-fund bonds of the State of Oklahoma (29 Op. 451); and the bonds are not acceptable as security for postal-savings deposits.

Respectfully,

WILLIAM R. HARR.

*Acting Attorney General.*

THE POSTMASTER GENERAL.

## NEWSPAPERS, MAGAZINES, ETC.—FILING STATEMENT OF OWNERSHIP.

Section 2 of the Post Office appropriation act of August 24, 1912, requiring newspapers, magazines, periodicals, and other publications to file statement of ownership, etc., applies only to such publications as are regularly entered as second-class mail matter.

DEPARTMENT OF JUSTICE,  
*October 31, 1912.*

SIR: I have the honor to acknowledge your letter of the 23d instant, in which you request an opinion as to whether or not paragraph 2, section 2, of the act of August 24, 1912, making appropriations for the postal service for the fiscal year 1913, which provides that the editor, etc., of every newspaper, magazine, periodical, or other publication, shall file with the Postmaster General, and with the postmaster "at the office at which said publication is entered," a semi-annual return showing certain facts, applies only to such publications as are regularly entered as second-class mail matter under the various acts of Congress, or whether it also applies to those periodical publications not admitted to the second class of mail matter, but mailed at the third-class rate.

Paragraph 2, section 2, *supra*, provides that it shall be the duty of the editor, etc., "of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the 1st day of April and the 1st day of October of each year, on blanks furnished by the Post Office Department, a sworn statement" setting forth certain facts in relation to the ownership of, and financial interest in the newspaper or publication, under a penalty of exclusion from the mails if the above statement be not filed as required. It is obvious that, while said paragraph, in its opening language, applies to *every* newspaper, etc., the succeeding words qualify this generality and limit the application of the language to such newspapers, etc., as are capable of being "entered." The term "entered" has a perfectly distinct and long-established meaning in postal administration, and its applica-

tion is limited to second-class mail matter exclusively. Section 442 of the Postal Laws and Regulations of 1902, provides as follows:

"SEC. 442. The Third Assistant Postmaster General will in all cases decide upon the admissibility of publications as second-class matter. He will examine all applications, as soon as practicable, and upon being satisfied that a publication is entitled to admission at such rates will authorize the postmaster at the proper office to issue a certificate of entry therefor.

"2. Upon notice from the Third Assistant Postmaster General the postmaster will issue a certificate on the form furnished by the Post Office Department.

"3. The publisher shall, upon the issue of the certificate, print upon each copy of the publication so entered the words, "Entered \_\_\_\_\_ at the post office at \_\_\_\_\_, as second-class matter under act of \_\_\_\_\_." \* \* \*

The subject, "entry of publications as second-class matter," is also treated of in many other sections of Title III, ch. V, of the Postal Laws and Regulations.

No provision is made for the "entry" of mail matter of the third class in Title III, ch. 12, of the Postal Laws and Regulations, which contains the provisions applicable to that class of mail matter.

It must be assumed that Congress used the word "entered" in the second paragraph of section 2 of the act of August 24, 1912, in the above established sense, and therefore intended to confine its operation to second-class mail matter only; and this is rendered more certain by the fact that the same act contains an appropriation "for printing, binding, and wrapping a revised edition of the Postal Laws and Regulations," and also has an express provision "that the proviso at the end of section 233 of the Postal Laws and Regulations be, and the same is hereby, amended so as to read as follows: \* \* \*" It thus appears that in the very act in which Congress used the technical term "entered," it distinctly recognized the force and effect of the Postal Laws and Regulations in which the meaning of that term is given.

Moreover, section 2 of the act of August 24, 1912 (37 Stat. 553), passed the House in the following form (Cong. Rec., 62d Cong., 2d sess., p. 11499) :

“That it shall be unlawful for any person, association, or corporation to enter or deposit or to have entered or deposited into the mails of the United States as second-class mail matter any newspaper, etc., \* \* \*.”

This was amended by the Senate committee to its present form, but the report of the committee shows clearly that there was no intent to change section 2 in so far as the class of mail matter affected thereby was concerned, but only to make the act less onerous and more practicable (S. Rept. No. 955, 62d Cong., 2d sess.). That report, after stating the nature of the act as it passed the House, continued :

“With the purpose of this paragraph the Senate committee is in hearty accord, as also, we believe, are a vast majority of the newspaper and periodical publishers of the country. The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter and since the publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

“But we believe that the requirements of the paragraph as passed by the House are needlessly burdensome, hence we recommend the substitution of a paragraph requiring that the list of owners, stockholders, or security holders be filed with the local postmaster and the Postmaster General semiannually and as frequently printed in an issue of the publication.”

It thus appears that this legislation was passed expressly upon the idea that papers which received the low rate of postage accorded to second-class mail matter owed a duty

to the public which rendered it proper that they should give publicity to their ownership, financial control, and circulation. Evidently these considerations have no application to publications which do not seek to take advantage of the low rates granted to second-class mail matter, but are content to pay the compensatory rate required of third-class mail matter.

I have the honor, therefore, to advise you that, in my opinion, paragraph 2, section 2, of the act of August 24, 1912, has no application to any other publications than those which are regularly entered as second-class mail matter.

Respectfully,

WILLIAM R. HARR,  
*Acting Attorney General.*

THE POSTMASTER GENERAL.

---

PORTO RICO—UNITED STATES DISTRICT COURT—  
EXPENSES.

The expenses of the District Court of the United States for Porto Rico should be paid from the funds of the Government of Porto Rico.

DEPARTMENT OF JUSTICE,  
*November 8, 1912.*

SIR: I have the letter of the Acting Secretary of the 29th of October asking my opinion upon the question whether the expenses of the United States District Court for Porto Rico should be paid from funds of the United States or of the Government of Porto Rico.

The act of April 12, 1900 (31 Stat. 77), to provide revenues and a civil government for Porto Rico, in section 34 provides that Porto Rico shall constitute a judicial district, to be called the district of Porto Rico, and authorizes the President to appoint a district judge, district attorney, and marshal for said district. The district court is to be called the District Court of the United States for Porto Rico, and was given the jurisdiction of both the district and circuit courts of the United States.

Section 12 of this act provides:

"That all expenses that may be incurred on account of the government of Porto Rico for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the internal improvement or development of the island, not, however, including defenses, barracks, harbors, lighthouses, buoys, and other works undertaken by the United States, shall be paid by the treasurer of Porto Rico out of the revenues in his custody."

Section 36 provides:

"That the salaries of all officials of Porto Rico \* \* \* appointed as herein provided by the President \* \* \* shall also be paid out of the revenues of Porto Rico on the warrant of the auditor, countersigned by the governor."

The section then fixes the salaries of all such officers, including the district judge, the district attorney, and marshal.

The act of March 2, 1901 (31 Stat. 953), amending the foregoing act, provides in section 2—

"That such fees and expenses as are payable by the United States, if earned or incurred in connection with a circuit or district court of the United States, shall be paid from the revenues of Porto Rico, if earned or incurred in connection with the district court of the United States for Porto Rico."

This section also contains a proviso that payment of fees and expenses theretofore made in good faith by the United States marshal from funds advanced by the United States or by Porto Rico shall be allowed by the proper accounting officers in the settlement of his accounts.

I think it conclusively appears from this legislation that it was the intention of Congress that all the expenses of the district court of the United States for the district of Porto Rico should be paid out of the revenues of Porto Rico.

Section 259 of the Judicial Code, becoming effective January 1 last, provides that the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico shall each be allowed and paid his necessary expenses of

travel and his reasonable expenses (not to exceed \$10 a day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law, at any place other than his official place of residence, said expenses to be paid by the marshal of the district upon the written certificate of the judge, but it does not provide that such expenses shall be paid by the United States.

It is true that the sundry civil appropriation act of March 4, 1911 (36 Stat. 1363, 1427), appropriated for the payment of such expenses of the judges in Alaska, Hawaii, and Porto Rico, but I am informed that no such payment was made by the United States on account of the expenses of the district judge in Porto Rico.

The current appropriation act for this purpose (the act of Aug. 24, 1912, 37 Stat. 417, 466) makes no provision for any of the expenses of the district judge in Porto Rico. The mere appropriation during one year of a small portion of the expenses of the district court of Porto Rico does not operate to repeal the affirmative legislation that all the expenses of that court and its officers shall be paid by Porto Rico.

I am, therefore, of the opinion that the act of April 12, 1900, as amended by the act of March 2, 1901, is still in force, and that the expenses of the United States district court for Porto Rico should be paid from the funds of the Government of Porto Rico.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

INFORMATION RELATING TO NATIONAL BANKS FOR THE  
USE OF CONGRESS.

The President may give to a committee of Congress information in the possession of the Comptroller of the Currency relative to the operation of national banks, if in his opinion, it is proper to do so; but if, in his opinion, the interests of the Government require that this information shall be treated as confidential, he has the right to refuse to divulge it.



If the President believes that this information should be obtained and considered by the Comptroller in the performance of his duties, he may direct him to procure it; and after it has been obtained for this legitimate purpose, he may, if he deems it proper, direct the Comptroller to furnish it to the committee of Congress. If, however, neither the President nor the Comptroller believes that such information is useful or necessary to the Comptroller in the performance of his duties, the President could not properly direct him to procure it.

DEPARTMENT OF JUSTICE,  
*November 9, 1912.*

SIR: By letter of September 24, Mr. Samuel Untermyer, one of the counsel for the Committee on Banking and Currency of the House of Representatives, which is now inquiring into the so-called Money Trust, states that he and his associates have asked the Comptroller of the Currency to secure certain data for the committee, without which it would be impossible to conduct the inquiry as directed by House resolution 504, under which the committee is proceeding, and that the comptroller has declined to secure the data without direction from you.

It appears from the letter that the committee first sought the data directly from the national banks themselves, but that their officers declined to furnish it, and that the committee now proposes to have the information obtained by the Comptroller of the Currency.

Paragraph 5 of House resolution 504 provides:

“The Comptroller of the Currency, the Secretary of the Treasury, and the Commissioner of the Bureau of Corporations, and their respective assistants and subordinates, are hereby respectively directed to comply with all directions of the committee for assistance in its labors, to place at the service of the committee all the data and records of their respective departments, to procure for the committee from time to time such information as is subject to their control or inspection, and to allow the use of their assistants for the making of such investigations with respect to corporations under their respective jurisdictions as the committee or any subcommittee may from time to time request.”

In his letter Mr. Untermeyer states:

"The committee desires to secure data showing (1) the character of the transactions in which certain of the leading national banks of the country have been engaging, such as the promotion and underwriting of securities on behalf of syndicates; (2) instances in which they have acted as what are known as 'issuing houses' for the sale of securities to the public; (3) transactions by the banks made directly or indirectly with their officers and directors, and with corporations in which such officers and directors were largely interested; (4) purchases and sales of bonds and shares of stock by the banks and speculations conducted by them or by corporations that are owned by them.

"These are in a general way the heads of the topics with respect to which we are seeking data as a basis for the oral examination of witnesses. Our general purpose is to acquaint Congress with the character of the business in which the larger banks are engaging; to point out the public dangers, if any, accompanying the broad powers now possessed by the banks in the use of their funds; and to expose whatever abuses may be found to exist in the present system, with a view of constructive and corrective legislation. The committee purposes further to show the inadequacy of the present currency laws, the danger of panics to which they give rise, and the legislation required to correct this situation."

You have referred this letter to me with a request to be advised as to your lawful powers to give the information ascertained through the Comptroller of the Currency.

It would appear from the letter of Mr. Untermeyer that but little, if any, of this information is now in the comptroller's possession, and that the comptroller, in order to furnish it, would be compelled to procure it by means of examinations of the banks. Two questions therefore arise in considering your request.

1. Whether you have the power to direct the comptroller to furnish to the House committee such information as is now in his possession?

2. Whether you may direct the comptroller to obtain other data and thereafter to furnish it to the committee?

1. The Comptroller of the Currency is the chief of the bureau of the Treasury Department charged with the execution of laws relating to the issue and regulation of the national currency secured by United States bonds, and he performs his duties "under the general direction of the Secretary of the Treasury" (sec. 324, R. S.).

The statutes relating to the national banks give him full visitatorial powers to enable him to see that the national banks faithfully observe the laws and avoid insolvency.

No association may commence business until its organization certificate has been submitted to the comptroller and he has certified that it has fully complied with all the provisions of law to entitle it to engage in business (secs. 5168, 5169). Where the association desires to extend its life beyond the original period, he must cause a special examination to be made to determine that its affairs are in a satisfactory condition (act July 12, 1882, sec. 3, 22 Stat. 163).

After commencing business each association must at least five times a year report to the comptroller, upon forms prescribed by him, its condition in great detail, and the comptroller may at any time call for a special report from any bank (sec. 5211).

The comptroller, with the approval of the Secretary of the Treasury—

"shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers and agents thereof on oath, and shall make a full and detailed report of the condition of the association to the comptroller. (Sec. 5240, as amended Feb. 19, 1875, 18 Stat. 329.)"

In order that he may adequately enforce the provisions of law imposing restrictions on the national banks the Comptroller is vested with power to put any national bank in the hands of a receiver for the purpose of wind-

ing up its affairs—first, for not keeping its capital stock above the minimum provided by law (sec. 5141); second, for not keeping good its surplus (sec. 5151); third, for not keeping its reserve up to the prescribed minimum (sec. 5191); fourth, for holding its own stock for more than six months (sec. 5201); fifth, for failure to pay up its capital stock or for failure to make good its impairment (sec. 5205); sixth, for improperly certifying a check (sec. 5208); seventh, for nonpayment of its circulating notes (sec. 5234). By section 5239, Revised Statutes, the Comptroller is charged with the duty of causing the dissolution of any national banking association through the institution of a suit to forfeit its charter whenever its board of directors knowingly violate or permit any of its officers or agents to violate any of the provisions of the national banking laws.

Finally, by section 333 of the Revised Statutes, as amended February 18, 1875 (18 Stat. 317), the Comptroller is directed to make reports to Congress at the commencement of each session exhibiting—

“First. A summary of the state and condition of every association from which reports have been received the preceding year, \* \* \* with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources \* \* \* and such other information in relation to such associations as, in his judgment, may be useful.

“Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

“Third. Any amendment to the laws relating to banking by which the system may be improved; and the security of its holders of its notes and other creditors may be increased.”

Also a statement of the business of savings banks organized under the laws of the several States and Territories, and the names and compensation of the clerks employed by him and the expenses of his bureau during the year.

Thus the banking laws clothe the Comptroller with authority to examine into the affairs of national banks for three main purposes: First, to ascertain the financial condition and soundness of management of national banks; second, to determine whether or not such banks are operating in conformity with the banking laws; third, to enable him to recommend amendments to the existing law.

Nowhere in the law is there any express provision that the information thus acquired by the Comptroller shall be confidential. While, if in your opinion, the interests of the Government require that this information shall be so treated, you have the right to refuse to divulge it (*Boske v. Comingore*, 177 U. S. 459, 469), yet, I am clearly of the view that if, in your opinion, it is proper to give this information to the House committee you have the lawful power to do so.

2. There remains the question whether you have the power to direct the Comptroller to collect the information described in Mr. Untermeyer's letter, which is not already in his possession.

At the outset it should be remarked that the paragraph of the House resolution undertaking to direct the Comptroller, the Secretary of the Treasury, and other executive officers to comply with all directions of the committee for assistance in its labors, has not legal effect. (6 Op. 680.) The duties of the Comptroller are imposed by law and can not be lessened or increased by resolution of one House. This question must be answered, therefore, from the statutes themselves without regard to the resolution. It is not suggested that the Comptroller needs the information in question to enable him to perform a duty devolved upon him by the statutes pertaining to his office. Mr. Untermeyer states that the committee of the House desires it to enable it to determine whether or not further legislation is necessary.

By section 5211, Revised Statutes, the Comptroller is expressly given—

“power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.”

One view of this section is that it limits the power of the Comptroller to call for reports concerning the financial condition of a particular association only, and that it is not broad enough to empower him to ask reports regarding *general* conditions which may have a bearing merely upon the expediency of amendments to the existing law. I think that too narrow a construction of the section, because section 333, Revised Statutes (above quoted), requires the Comptroller to make an annual report to Congress at the commencement of its session, showing, among other things, "any amendment to the laws relating to banking by which the system may be improved and the security of the holders of its notes and other creditors may be increased," and the power given in section 5211 to call for special reports is, in my opinion, broad enough to authorize him to call for any reports which may be necessary to enable him to determine how, in his opinion, the banking system may be improved by new legislation and what legislation he should recommend to Congress for that purpose.

This view is strengthened by the provisions of section 5240, which authorize the comptroller, with the approval of the Secretary of the Treasury, "as often as shall be deemed necessary or proper," to appoint suitable persons to make an examination of the affairs of every banking association, such examiners to have power—

"to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers and agents thereof on oath, and shall make a full and detailed report of the condition of the association to the comptroller."

But clearly the comptroller can not exercise such power merely for the purpose of procuring information for a committee of one of the Houses of Congress on which that committee may base *its* conclusion as to what amendatory legislation is necessary or desirable. If the committee is without adequate powers to enable it to pursue the inquiry committed to it by the House (as to which I express no opinion), it should seek additional power by way of amendment to the law or by joint resolution of both Houses of

Congress. It can not properly expect the Comptroller of the Currency, by a strained construction of the statutes, to exercise a power given to him for a definite purpose to procure information for another purpose, thus furnishing indirectly to the committee information which the law does not authorize it to get directly.

Since the comptroller exercises his functions under the general direction of the Secretary of the Treasury, and therefore of yourself, it follows that if either you or the Secretary think that the comptroller should have before him in the performance of his duties any of the information mentioned in Mr. Untermeyer's letter, you have the lawful power of directing him to acquire it.

It is true that while the comptroller is performing quasi-judicial functions his discretion can not be controlled by you (*Butterworth v. Hoe*, 112 U. S. 50), yet this is not so of all his duties, otherwise the provision in the statute that he perform his duties under the general direction of the Secretary of the Treasury would amount to nothing. Certainly, broad general lines of policy may be laid down by you to be followed by the comptroller; and you may direct him to make inquiries along certain lines and to consider the data thus acquired in determining whether individual banks are in sound condition and are obeying the existing law, and whether amendments thereto should be recommended.

If, therefore, you believe that any information outlined by Mr. Untermeyer should be obtained and considered by the comptroller in the performance of *his* duties, in my opinion, you may direct him to procure it; and after it has been obtained for this legitimate purpose you may, if you deem proper, direct him to furnish it to the House committee. If, however, neither you nor the comptroller believe that such information is useful or necessary to him in the performance of his duties, you could not properly direct him to procure it.

I express no opinion as to the *propriety* of furnishing to the House committee any information gathered by the comptroller. I am informed that it has been the custom of his office to consider a great part of such information

as confidential. But as to the wisdom of applying this rule in the present instance, the Secretary of the Treasury and the comptroller can best advise you.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

---

COURT-MARTIAL—EMBEZZLEMENT—ASSISTANT PAYMASTER IN THE NAVY.

The willful use of Government funds by a pay officer of the Navy for the purpose of cashing a certificate of deposit as an accommodation to a personal friend, constitutes embezzlement under the provisions of sections 87 and 89 of the Criminal Code.

The overpayment by a pay officer of the Navy to himself from public funds, where the officer is guilty of such negligence or indifference as to indicate a willful disregard of the duties imposed upon him by law with respect to the safe-keeping of the moneys in his charge, is in violation of sections 87 and 89 of the Criminal Code.

The willful withdrawing of public funds by a pay officer of the Navy for his personal use while absent from his station of duty, even though there be no intention on his part to defraud the United States and the funds withdrawn are subsequently replaced, is a violation of the provisions of sections 87 and 89 of the Criminal Code.

View expressed that charge of embezzlement should be formulated under paragraph 9, article 14 of the Articles for the government of the Navy, but as a matter of precaution advised that such charge be formulated under both said paragraph and article 22, or "catch, all" clause of said articles.

DEPARTMENT OF JUSTICE,

*November 12, 1912.*

SIR: I have the honor to reply to your letter of September 3, in which you request an opinion upon certain questions arising in connection with the general court-martial proceedings against Asst. Paymaster Russell V. de W. Bleecker, of the Navy, charged with violating article 14 of the Articles for the government of the Navy, set forth under section 1624 of the Revised Statutes of the United States. The questions are thus stated:

"1. Does the willful use of Government funds by a pay officer of the Navy for the purpose of cashing a certificate



of deposit as an accommodation to a personal friend constitute embezzlement under the circumstances of this case as set forth in specification 1 of the third charge preferred against Asst. Paymaster Bleecker?

“2. Does an overpayment made to himself from public funds by a pay officer in the Navy constitute embezzlement where it appears that there may have been no criminal intent involved, but the pay officer was at least guilty of negligence or indifference as to the status of his account?

“3. Is a pay officer of the Navy guilty of embezzlement in willfully withdrawing public funds for his personal use while absent from his station and duty, and marking the check so drawn as exchanged for cash, where the evidence does not establish that he had any intention of defrauding the United States, and upon his return to duty five days later he replaced the amount so withdrawn?”

Specification 1 of the third charge, referred to in the first question, reads:

“In that Russell V. de W. Bleecker, an assistant paymaster in the United States Navy, attached to and serving at the United States naval station, Key West, Florida, having received into his possession and under his control, in the execution and under color of his office as aforesaid, money of the United States, furnished and intended for the naval service thereof, for the disbursement of which according to law he, the said Bleecker, was responsible, did, on or about the thirteenth day of April, nineteen hundred and twelve, at St. Petersburg, Florida, embezzle and convert to his own use public funds entrusted to his care to the value and amount of one thousand dollars, in that the said Bleecker did, on the said date, at the said place, draw checks numbered five hundred eighty-six thousand six hundred and ninety and five hundred eighty-six thousand six hundred and ninety-one, each to the value of five hundred dollars, to his own order on the Assistant Treasurer of the United States at New York, New York, and each by him, the said Bleecker, marked ‘exchange for cash,’ and did exchange the said checks for a certain pri-

vate certificate of deposit for one thousand dollars on a bank in Jonesboro, Arkansas, drawn in favor of one Ella Galvin."

The fourteenth Article for the government of the Navy (R. S. 1624), under which the third charge was laid, provides:

"Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States—

\* \* \* \* \*

"Who steals, *embezzles*, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military or naval service thereof;  
\* \* \*."

In connection with the questions presented, you refer to sections 87 and 89 of the Criminal Code, and say that, in the opinion of your Department, the evidence against Asst. Paymaster Bleecker in the court-martial proceedings shows a violation of both those sections.

The sections referred to are as follows:

"Sec. 87. Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

"Sec. 89. Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys,

who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years."

In my opinion, upon the facts stated in connection with your several questions, a paymaster officer of the Navy would be guilty of violating either one or both of the above sections, since neither of them require an intent to defraud the Government, but only an intent to do the thing prohibited. It appears to be the settled construction of the War Department that in order to constitute embezzlement under section 5488 of the Revised Statutes, now section 87 of the Criminal Code, an intent to defraud is unnecessary. Thus in Howland's Digest of Opinions of the Judge Advocates General of the Army, pages 145-146, referring to charges laid under the sixty second article of war for the violation of the act of June 14, 1866, afterwards section 5488 of the Revised Statutes, it is said—

"that to constitute such embezzlement it is not necessary that there should have been a personal conversion of the funds or an intent to defraud. The object of the law is to provide a safeguard against the misuse and diverting from their appointed purpose of public moneys, and the intent of the offender, whether fraudulent or not, enters in no respect into the statutory crime. If the withdrawal or application of the funds is simply one not prescribed or authorized by law, the offense is complete. R. 25, 588, May, 1868: 27, 116, July, 1868; 33, 494, Nov., 1872; 38, 96, May, 1876. An absence, however, of criminal motive in the illegal act may be shown in mitigation of sentence in a military case. R. 33, 494, *supra*. So held that it constituted no *defense* to a charge of an embezzlement of this class (though it might be shown in mitigation of punishment) that the officer had restored to the public depository the funds illegally withdrawn by him before a formal demand was made for the same. R. 25, 588, *supra*."

In a note to the above the following is quoted from an opinion of Judge Advocate Gen. Holt in support of the statements made in the text:

“ \* \* \* The statute of 1866, in view of which it was preferred, is the expression of extreme vigilance in regard to the proper use and disposition of the public moneys, found by the experience of the Government to have become imperatively necessary to be observed. It provides an additional safeguard of the Public Treasury by enacting that any disbursing officer who shall withdraw, transfer, or apply any of the public funds intrusted to him for any purpose not authorized by law shall be deemed guilty of a felonious embezzlement and be punished accordingly. The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offense. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law, he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction. The offense created by this act belongs to the class known as *mala prohibita*, but it is upon the repression of this class of offenses that the safety of the Public Treasury largely depends.”

All that appears to be required to constitute a violation of a statute of this kind is that the defendant should have intended to do the prohibited act. (*Armour Packing Co. v. United States*, 209 U. S. 56, 85-86; *Dimmick v. United States*, 121 Fed. 638, 643.)

Referring to your first question, it appears therefrom in connection with the facts stated in specification 1 of the first charge that Bleeker willfully withdrew, from the Assistant Treasurer of the United States at New York, Government funds for the purpose of cashing a certificate of deposit as an accommodation to a personal friend, this being for a purpose not prescribed by law, and therefore covered by the second clause of section 87 of the code. Such transaction also appears to be in violation of the provision of section 89 against the “exchange for other funds, except as

specially allowed by law," of a portion of the public moneys intrusted to such an officer for safe-keeping.

Your second question—

"Does an overpayment made to himself from public funds by a pay officer in the Navy constitute embezzlement where it appears that there may have been no criminal intent involved, but the pay officer was at least guilty of negligence or indifference as to the status of his account"—appears to be answered by what was said in my opinion of May 9, 1910, in the case of Asst. Paymaster Haughey (28 Op. 286), assuming that the negligence or indifference attributed to the officer was such as to indicate a willful disregard of the duties imposed upon him by law with respect to the safe-keeping of the moneys in his charge. This would appear to be in violation of the provisions of sections 87 and 89 with respect to public officers converting public moneys to their own use except as authorized by law.

The action of a pay officer of the Navy in willfully drawing public funds for his personal use while absent from his station and duty, as stated in your third question, also clearly amounts to a violation of the provisions of sections 87 and 89 against converting public funds to his own use except as authorized by law, although there be no intention on his part to defraud the United States, and the funds withdrawn are subsequently replaced.

It is suggested that the word "embezzles," as used in paragraph 9, article 14, of the Articles for the government of the Navy, does not refer to embezzlement as defined in the Criminal Code, but to that offense as it is generally understood—that is, a conversion of funds with an intent to defraud the true owner out of the use thereof—and hence that the charge of embezzling money in violation of sections 87 and 89 of the Criminal Code should be formulated under article 22 or "catch-all" clause of the Articles for the government of the Navy and not under Paragraph 9, article 14. This distinction was not suggested in the Haughey matter, and hence it was not there given any special consideration.

It is true that a willful or fraudulent intent is required as an element of many of the offenses specified in the several paragraphs of article 14, yet if embezzlement as defined in the Revised Statutes, and now by the Criminal Code of the United States, is not the offense referred to in paragraph 9, article 14, what is the precise nature of the offense there mentioned? Where a common-law offense is named in an act of Congress without defining it, undoubtedly the courts will construe the statute as applying to the offense as defined at common law; but embezzlement is not a common-law offense. In 15 Cyc. 489, 490, it is said—

“the offense (of embezzlement) is of purely statutory origin, and, accordingly, the particular statutes of the various jurisdictions must be looked to in order to determine the constituent elements of the offense therein.”

No resort can be had to the definitions of embezzlement given in the laws of the several States, as there is no uniformity in the State statutes upon the subject. In many States a fraudulent intent is an essential ingredient of the crime, while in others it is not. *State v. Hopkins*, 56 Vt., 250; *United States v. Adams*, 2 Dak., 305; *State v. Stimson*, 24 N. J. L., 478; *Minnesota v. Czizek*, 38 Minn., 192.

Again, if the statutory embezzlement is not referred to in paragraph 9, article 14, then a naval officer who converts funds intended for the naval service may be guilty of two kinds of embezzlement, one of which is defined in the Criminal Code, and for which he may be punished in the proper civil court, or by a court-martial under article 22 of the Articles for the government of the Navy, and the other of which has no certain definition and for which he may be punished by court-martial under paragraph 9, article 14, of said Articles. I can see no reason why such a distinction should be drawn between a naval or an Army officer and any other official of the Government charged with the safe-keeping of funds, nor why the offense of embezzlement when committed by a Government official should not be the same, regardless of the line of service in which he is employed.

570 *Exportation of Air Rifles and Caps for Toy Pistols.*

There is another reason why a charge for embezzlement formulated under article 22 would be of doubtful validity. The language of that article is:

"All offenses committed by persons belonging to the Navy *which are not specified in the foregoing articles* shall be punished as a court-martial may direct."

Paragraph 9 of article 14 expressly specifies as an offense for which the offender may be punished by fine and imprisonment, or such other punishment as a court-martial may adjudge, the embezzling by any person in the naval service of money furnished or intended for the military or naval service. Bleecker was in the naval service and is charged with embezzling money appropriated for the naval service, and it could with much reason be urged that his offense is excluded by express language from article 22.

However, I know of no rule of practice which prohibits the formulation of the same charge under more than one article, and as a matter of precaution it might be advisable to formulate the charges against Bleecker under both paragraph 9, article 14, and article 22.

Respectfully.

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

---

EXPORTATION OF AIR RIFLES AND PAPER CAPS FOR TOY  
CAP PISTOLS TO MEXICO.

Paper caps for toy cap pistols could hardly be considered within the prohibition of the President's proclamation of March 14, 1912, issued pursuant to the joint resolution of the same date, forbidding the exportation of arms and munitions of war to Mexico, whereas air rifles might well be regarded within the prohibition. The question, however, is one of fact, dependent upon the character of the articles sought to be imported.

DEPARTMENT OF JUSTICE,

*November 18, 1912.*

SIR: I have your favor of the 16th instant, in which, referring to my previous letter of June 5, 1912, in which I advised you that toy pistols were not within the mean-

ing of "arms or munitions of war" as used in the President's proclamation of March 14, 1912, you now advise me that your department has been requested to secure authorization for the exportation to Mexico of a number of air rifles and a case of paper caps for toy cap pistols; and you ask whether, in my opinion, these articles are included within the meaning of the term "arms or munitions of war" as used in the President's proclamation above mentioned.

In my opinion to the President dated March 25, 1912 (29 Op. 375), I suggested the following as embracing all that is within the practical purpose which the joint resolution and the proclamation were intended to accomplish, namely:

"Articles primarily and ordinarily used for military purposes in time of war, such as weapons of every species used for the destruction of life, and projectiles, cartridges, ammunition of all sorts, and other supplies used or useful in connection therewith, including parts used for the repair or manufacture of such arms, and raw material employed in the manufacture of such ammunition; also dynamite, nitroglycerin, or other explosive substances; also gun mountings, limber boxes, limbers, military wagons; field forges and their component parts, comprising equipment of a distinctively military character; articles of camp equipment and their distinctive component parts; and implements manufactured exclusively for the manufacture of implements of war, or for the manufacture or repair of arms or war material."

In my further opinion to the President dated April 20, 1912 (29 Op. 394), I expressed the opinion that saddles, bridles, canteens, and carbine scabbards, which were used in promoting the disturbances in Mexico, fell within the purpose of the joint resolution, which was to prohibit the exportation "of such arms or munitions of war as are used in promoting conditions of domestic violence."

In an opinion rendered to you on May 20, 1912 (29 Op. 414), the view was expressed that gun grease prepared expressly for use in connection with guns of some sort fell



572 *Foreign Tugboat Towing Logs into Ports of U. S.*

within the definition of "supplies used or useful in connection with weapons of some species used for the destruction of life" and therefore within the prohibition of the joint resolution and proclamation.

Applying these principles to the present inquiry, it would seem that paper caps for toy cap pistols could hardly be regarded as weapons of any species used for the destruction of life, whereas air rifles might well be employed for that purpose. The question is one of fact, dependent upon the actual character of the articles sought to be exported, and it is believed that the definition and rulings above referred to will afford a sufficient guide in determining the application of the resolution and the President's proclamation to the case presented.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

---

FOREIGN TUGBOAT TOWING LOGS INTO DIFFERENT PORTS  
OF THE UNITED STATES.

A foreign tugboat clearing from Vancouver, British Columbia, with logs in tow, some of which are destined to Anacortes, Wash., and the remainder to Bellingham, Wash., may lawfully be permitted, after arrival at Anacortes and delivery there of the logs consigned to that port, to proceed to Bellingham with the remaining logs in tow for delivery there.

DEPARTMENT OF JUSTICE,  
*November 20, 1912.*

SIR: I have the honor to acknowledge your letter of the 25th ultimo requesting my opinion on the question, "whether, in view of the provisions of section 4371, Revised Statutes, section 7 of the act of June 19, 1886, and section 4347, Revised Statutes, as amended February 15, 1893, and February 17, 1898, a foreign tugboat clearing from Vancouver, British Columbia, with 30 sections of logs in tow, 15 of which are destined to Anacortes, Wash., and 15 of which to Bellingham, Wash., may lawfully be permitted, after arrival at Anacortes and delivery there of

the logs consigned to that port, to proceed to Bellingham with the remaining logs in tow for delivery there, or whether the towing under such circumstances from Anacortes to Bellingham may lawfully be done only by an American vessel."

Section 4371, Revised Statutes, provides as follows:

"SEC. 4371. Every vessel of twenty tons or upward, other than registered vessels found trading between district and district, or between different places in the same district, or carrying on the fishery without being enrolled and licensed, or if less than twenty tons and not less than five tons, without a license, in the manner provided by this title, if laden with merchandise the growth or manufacture of the United States only, distilled spirits excepted, or in ballast, shall pay the same fees and tonnage in every port of the United States at which she may arrive as vessels not belonging to a citizen of the United States; and, if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea-stores, she shall, together with her tackle, apparel, and furniture, and the lading found on board, be forfeited."

Section 7 of the act of June 19, 1886 (24 Stat. 79, 81), provides as follows:

"SEC. 7. Every vessel of twenty tons or upwards, entitled to be documented as a vessel of the United States, other than registered vessels, found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, and every vessel of less than twenty tons and not less than five tons burden found trading or carrying on the fishery as aforesaid without a license obtained as provided by this title, shall be liable to a fine of thirty dollars at every port of arrival without such enrollment or license. But if the license shall have expired while the vessel was at sea, and there shall have been no opportunity to renew such license, then said fine of thirty dollars shall not be incurred. And so much of section four thousand three hundred and seventy-one of the Revised Statutes as relates

to vessels entitled to be documented as vessels of the United States is hereby repealed."

Clearly section 4371, Revised Statutes, as it stood prior to the passage of section 7 of the act of June 19, 1886, did not apply to foreign vessels at all, but only to such vessels as were capable of being enrolled and licensed, or licensed only, which foreign vessels are not. (R. S. 4131, 4311, 4142, 4312, 4320.) The penalty prescribed by section 4371 is the payment of the tonnage dues to which foreign vessels are liable by section 4219, Revised Statutes, so that of course such vessels can not be within section 4371, Revised Statutes. If any authority be needed on such a plain proposition it is furnished by the opinion of Attorney General Brewster in 17 Op. 388.

Section 7 of the act of June 19, 1886, quoted above, provides:

"\* \* \* And so much of section four thousand three hundred and seventy-one of the Revised Statutes as relates to vessels entitled to be documented as vessels of the United States is hereby repealed."

It must be admitted this language suggests that Congress thought section 4371 did, in some way or to some extent, apply to vessels which were *not* entitled to be documented as vessels of the United States. But, as pointed out above, section 4371 is incapable of a construction which shall make it applicable to such vessels, and Congress did not see fit to change its language. The bare inference as to what Congress thought the act covered, to be drawn from the peculiar terms of the repealing clause of section 7 of the act of June 19, 1886, can not operate to make a new act or bring within the old one a subject-matter clearly not within its terms.

Moreover, it is not certain that Congress meant by the repealing portion of section 7 to intimate that foreign vessels were within section 4371, Revised Statutes. Section 7 was a part of H. R. 4838, Forty-ninth Congress, first session (49th Cong. Rec., 1st sess., pp. 958, 1149). The Senate struck out section 7 altogether. (Ibid., p. 4571.) It was restored in conference, and the managers on the part of the

Senate in the conference reported of this restoration as follows (Ibid., 4992):

"Amendment 8 adopts section 7 of the bill as passed by the House, by which *a vessel of the United States* without the usual papers is subjected to a fine instead of forfeiture."

The House managers made the same statement. (Ibid., p. 4999.) It appears to me clear, therefore, that section 4371, even when read in connection with section 7 of the act of June 19, 1886, has no application to foreign vessels.

Section 4347, Revised Statutes, as amended, provides:

"That no merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States. But this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States: *Provided*, That no merchandise other than that imported in such vessel from some foreign port which shall not have been unladen shall be carried from one port or place in the United States to another."

I do not feel any doubt that this section has not been violated in the case put by you. Indeed, the facts stated appear to show the very kind of traffic which section 4347, Revised Statutes, excepts. It is the transportation by water of merchandise, viz, logs, from a foreign port, viz, Vancouver, British Columbia, to a port of the United States, viz, Bellingham, via another port of the United States, viz, Anacortes, *without unloading*.

In the two cases of *In re Laidlaw* (42 Fed. 401), and *Laidlaw v. Abraham* (43 Fed. 297), it appeared that a vessel sailed from England with a cargo consisting partly of goods invoiced to San Diego, and partly of cement invoiced to Portland. It stopped at San Diego, unloaded the goods destined for that point, and proceeded to Portland with the cement. Judge Deady held that section 4347, Revised Statutes, had not been violated. He said (42 Fed. 402):

"\* \* \* So long as the cement remained on board of the vessel, as a matter of fact, it was not in my judgment

unladen. The general object of the statute is to prevent vessels owned by foreigners from engaging in the coasting trade, and the special exception is, *that such a vessel may carry its cargo, or any part of it, brought from a foreign port, from one district to another of the United States.*" (Italics mine.)

I am unable to distinguish the case decided by Judge Deady from the case submitted by you. Certainly to tow logs is to transport merchandise within the meaning of section 4347, Revised Statutes. In *The Annie S. Cooper* (48 Fed. 703, 704), Judge Billings said:

"\* \* \* A raft of logs is a contrivance whereby the logs themselves are kept together, and thus made capable of being transported. They are not the means, and the whole structure is not a means of transporting anything but the things which make up the structure. Therefore a raft of logs might not be strictly a vessel."

It is equally certain that the portion of the logs destined for Bellingham was not "unladen" at Anacortes. The words "imported in" in the proviso to section 4347, Revised Statutes, must be given the same meaning as the words "transported by" in the opening clause of the section. Originally "imported" was used in both places (Comp. Stats. 1901, p. 2971), and the change is simply for the purpose of greater accuracy in the use of terms. The main consideration is that these logs were not transported coastwise in trade between Anacortes and Bellingham, but were, in every substantial sense, transported from Vancouver to Bellingham. Moreover, a comparative examination of sections 4219, 4371, as amended, and 4347, as amended, Revised Statutes, shows that the towing referred to in your letter does not come within the spirit of these prohibitory statutes. Section 4219 levies a tonnage tax "upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise *taken in one district to be delivered in another district.*" Section 4371 inflicts the penalty of a fine upon vessels "*found trading between district and district, or between different places in the same district*"

without proper papers. Section 4347, as amended, provides that merchandise shall not be transported from one port of the United States to another port of the United States in foreign vessels *under penalty of forfeiture*. Evidently all these statutes refer to the coasting trade only, and supplement each other so as to cover the whole field. If foreign vessels are within section 4371, Revised Statutes, then, for the same act, they are liable to a fine by that section, and to forfeiture of their cargo by section 4347, as amended. In like manner, a comparison of the three sections shows that section 4347, Revised Statutes, as amended, can only apply to the coasting trade, to "trading between district and district," or to goods "taken in one district to be delivered in another district."

I have the honor, therefore, to advise you that the towing in question does not violate any law of the United States to which you have called my attention.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

#### PORTO RICO—LEGALITY OF BOND ISSUE.

The issuance of bonds by Porto Rico for an extension of the system of irrigation, as provided by an act of the legislative assembly of Porto Rico, approved March 9, 1911, not being in excess of 7 per cent of the aggregate tax valuation of its property, is legal.

The form of the proposed bond appears to comply with the requirements of sections 11, 12, and 14 of said act of March 9, 1911, the relevant sections upon this subject.

DEPARTMENT OF JUSTICE,

*November 22, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant informing me that the Executive Council of Porto Rico has adopted a resolution approving the issue of registered bonds of the denomination of \$5,000 each to the amount of \$1,000,000, under authority of an act of the Porto Rican legislative assembly (No. 74) approved March 9, 1911 (Laws of Porto Rico, 1911, pp. 237,

241 et seq.). You state that this issue of bonds will not increase the public indebtedness of Porto Rico beyond the limitation of 7 per cent of the aggregate tax valuation prescribed by section 38 of the act of Congress of April 12, 1900 (31 Stat. 77), and request my opinion as to its legality.

On September 18, 1908, the legislative assembly of Porto Rico passed an act, known as "the Public irrigation law" (Laws of Porto Rico, 1908, special session, p. 44), to provide for the construction of an irrigation system between certain rivers on the island, and on the same day passed an act providing for an issue of bonds to an amount not exceeding \$3,000,000 to pay for said improvement (Ibid. 72). The validity of this issue was referred to Attorney General Bonaparte, and by him sustained in a carefully considered opinion (27 Op. 104). The act of March 9, 1911, to which you call my attention, simply provides for an extension of this system of irrigation, changing the details of its administration in certain respects, and for the issue of "additional" bonds (sec. 9) to cover the increased cost (sec. 15). Some changes are made in details as to the form, sale, etc., of the bonds, but Mr. Bonaparte's opinion is as controlling of the new issue as of the old, and determines its validity. (See also my opinion to you of July 11, 1912, on the issuance of bonds by the Government of Porto Rico for port improvements at San Juan, 29 Op. 497.)

I have examined the form of registered bond submitted by you, and it appears to comply with the requirements of sections 11, 12, and 14 of the act of March 9, 1911, *supra*, which are the provisions relative to the subject, except that at the end of the bond reference is made to an act of the Legislative Assembly of Porto Rico of March 7, 1912. You have not called my attention to any act of this date, and I have not been able to identify it in the laws of Porto Rico.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

**RADIO COMMUNICATION—ISSUANCE OF LICENSES.**

The Secretary of Commerce and Labor has no authority under the act of August 13, 1912 (37 Stat. 302), to refuse to grant a license to a domestic corporation to operate apparatus for trans-Atlantic radio communication on the ground that the stock of the corporation is owned or controlled by foreigners.

A corporation organized under the laws of the State of New York whose stock is owned by German interests can not be denied such a license until, by reciprocal arrangement with Germany, American capital is guaranteed the right of investing in and controlling corporations organized under German laws to operate coast stations in Germany for trans-Atlantic radio communication.

DEPARTMENT OF JUSTICE,  
*November 22, 1912.*

SIR: I have the honor to respond to your request of October 24 for my opinion on two questions concerning your powers in issuing licenses under the act to regulate radio communication approved August 13, 1912 (37 Stat. 302).

It appears from your letter that the Atlantic Communication Co. is applying for a license to operate at Sayville, Long Island, apparatus designed for trans-Atlantic radio communication. It is a corporation organized under the laws of the State of New York. Intimations having been received that it is a subsidiary of or is owned by certain German interests, you ask, first—

“Can the Secretary of Commerce and Labor refuse to grant an application for a license to use or operate radio communication (sec. 1) to a company incorporated under the laws of the State of New York (sec. 2) on the ground that the capital of the corporation is German capital?”

Sections 1 and 2 of the act provide:

*“Be it enacted, etc., That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect*



of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, *except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor;* \* \* \* Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States.

“SEC. 2. That every such license shall be in such form as the Secretary of Commerce and Labor shall determine and shall contain the restrictions, pursuant to this act, on and subject to which the license is granted; *that every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico,* and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; \* \* \*.”

As the Atlantic Communication Co. is a corporation of the State of New York, it is manifest that it comes within the class of persons and corporations to whom licenses are limited. The statute does not undertake to exclude from its benefits domestic corporations whose stock is owned or controlled by foreigners. Unless, therefore, you have some discretion in issuing licenses under the act to the persons or corporations named as its beneficiaries, you have no authority to refuse a license to a domestic corporation on the ground that it is owned or controlled by foreigners.

The language of the act, the nature of the subject matter regulated, as well as the general scope of the statute,

negative the idea that Congress intended to repose any such discretion in you in the matter of licenses. It is apparent from the act as a whole that Congress determined thereby to put the subject of radio communication under Federal supervision so far as it was interstate or foreign in its nature. It is also apparent therefrom that that supervision and control is taken by Congress upon itself, and that the Secretary of Commerce and Labor is only authorized to deal with the matter as provided in the act, and is given no general regulative power in respect thereto. The act prescribes the conditions under which the licensees shall operate, containing a set of regulations, with penalties for their violation.

This being so, it is manifest that when Congress said that "a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication \* \* \* except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor," it did not intend to repose any discretion in the Secretary as to the granting of the license, if the application came within the class to whom licenses were authorized to be issued.

If there were any doubt on this point, it would be removed by the committee reports on the bill. Thus the Committee on the Merchant Marine and Fisheries of the House (H. R. Rept. No. 582, 62 Cong., 2d sess., p. 9) said:

"The first section of the bill defines its scope within the commerce clause of the Constitution, and requires all wireless stations, ship and shore, public and private, to be licensed by the Secretary of Commerce and Labor. *This section does not give the head of that Department discretionary power over the issue of licenses*, but in fact provides for an enumeration of the wireless stations of the United States and on vessels under the American flag. The license system proposed is substantially the same as that in use for the documenting upward of 25,000 merchant vessels."

The report of the Senate Committee on Commerce also states that the system of licenses for stations and operators is similar to the system for registering and licensing merchant vessels and licensing officers of steam vessels (S. Rept. No. 698, 62 Cong., 2d sess., pp. 12-13). There is no question, of course, that the Secretary has no discretion in licensing vessels possessing the requisite qualifications under the laws of the United States. (See 29 Op. 188.)

Furthermore, Senator Bourne, the chairman of the Senate Committee on Commerce, when the bill was before the Senate, said that "it is compulsory with the Secretary of Commerce and Labor that upon application these licenses shall be issued." (48 Cong. Rec. 6015.)

It may also be observed that Congress was careful to reserve complete control over the situation by providing, in section 2, that "every such license shall be subject to the regulations contained herein, and such regulations as may be established from time to time by authority of this act or subsequent acts and treaties of the United States," and also by requiring that "every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners."

Your second question is:

"If that question [i. e., the first] be answered in the negative, can the application for the license described be denied until by reciprocal arrangement with Germany, American capital is guaranteed the right of investing in and controlling corporations organized under German laws to operate coast stations in Germany for trans-Atlantic radio communication?"

This is answered by what has been said as to the mandatory character of the licensing provisions of the act. An arrangement somewhat similar to that indicated in your question was required by the President as a condition

precedent to the landing of foreign-owned cables. (See 22 Op. 13; Moore Dig. Internat. Law, sec. 227.) But that case is not analogous. Action by the Executive was justified there because Congress had not legislated, and it was recognized that the power to impose conditions at all was subject to subsequent congressional action. (22 Op. 27.) Here, Congress has acted and has covered the subject, and, as above stated, you have no discretion but to carry out the provisions of the statute. Therefore, your second question must also be answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

---

#### EIGHT-HOUR LAW—DREDGING CONTRACTS.

Under the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), it will not be necessary to report the cases of any persons working more than eight hours a day upon any vessel engaged in dredging under a Government contract, irrespective of whether such persons are connected with the vessel as a part of its crew in its operation and management or are only employed thereon in the particular work of dredging and handling material.

Where the administrative officer in charge is in doubt as to whether a dredging contract involves the employment of laborers or mechanics, the wisest course is to insert in the contract the eight-hour restriction required by the act of June 19, 1912, leaving the status of any particular person as to whom the question is raised to be determined by the actual facts of his employment.

DEPARTMENT OF JUSTICE,

*November 27, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant requesting my opinion whether, under the recent eight-hour law, of June 19, 1912 (37 Stat. 137), it will be necessary to insert in dredging contracts entered into after January 1, 1913, the provision regarding the employment of laborers and mechanics more than eight hours in any one calendar day, and whether it will be necessary to report the cases of all persons working more than eight hours a day upon any

vessel engaged in dredging under such contracts, irrespective of whether they are connected with the vessel as a part of its crew in its operation and management, or are only employed thereon in the particular work of dredging and handling the material.

In the cases of the *Eastern Dredging Company v. United States* and the *Bay State Dredging Company v. United States*, 206 U. S. 246, 258 et seq., the Supreme Court held that persons employed on dredges and scows in dredging a channel in a harbor are not "laborers or mechanics" within the meaning of the act of August 1, 1892 (27 Stat. 340). The court said (206 U. S. 259, 260):

"The words laborers and mechanics are admitted not to apply to seamen as that name commonly is used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of tugs, or even with mates, engineers and firemen of the same. *Wilson v. The Ohio*, Gilpin, 505; *Holt v. Cummings*, 102 Pa. St. 212. The scows and floating dredges were vessels. Rev. Stat. §§ 3, 4612. They were within the admiralty jurisdiction of the United States. *The Robert W. Parsons*, 191 U. S. 17. (A number of cases as to dredges in the Circuit and District Courts are referred to in *Brown Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. Rep. 290). Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the United States. Rev. Stat., § 4612; *Saylor v. Taylor*, 77 Fed. Rep. 476; S. C., 23 C. C. A. 343. See also act of Mar. 3, 1875, chap. 156, § 3; 18 Stat. 485; *Bean v. Stupart*, 1 Dougl. 11; *Disbrow v. The Walsh Bros.*, 36 Fed. Rep. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a less degree, to them. Whatever the nature of their work it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship. Without further elaboration of details, we are of opinion that the persons em-

ployed by the two defendant companies were not laborers or mechanics and were not employed upon any of the public works of the United States within the meaning of the act. As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn."

The rule thus laid down has, as the case cited by the court clearly show, become, after some fluctuations, firmly established in the United States courts. In *Saylor v. Taylor*, 77 Fed. 476, 478, the Circuit Court of Appeals said:

"\* \* \* If it be considered necessary to give a reason for a rule supported by a great weight of authority, it would be found in this, that a vessel and her crew are considered a unit. Each person aboard of her contributes according to his capacity to the success of the enterprise in which she is engaged. If she comes within the maritime jurisdiction the persons employed aboard of her come also, with all the rights and disabilities which flow therefrom \* \* \*."

The rule is said, by Brown, J., in *The Minna*, 11 Fed. 759, 760, to be "that all hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged." To the same effect are *The James H. Shrigley*, 50 Fed. 287; *Lawrence v. Flatboat*, 84 Fed. 200, affirmed 86 Fed. 907; *The J. S. Warden*, 175 Fed. 314, and the cases cited in those opinions.

It may, therefore, be confidently asserted that, by the established rule of the Federal courts, all the persons regularly employed on a dredge to assist in its operation as a dredge are seaman and not "laborers or mechanics," and the particular nature of their duties makes no difference as a rule. Mr. Justice Moody, in his dissenting opinion in the dredge cases referred to *supra* (206 U. S. 264 et seq.), says all that can be said in favor of the view that it is the nature of the work being done which ought to

govern, but the majority of the court refused to adopt this view and evidently excluded from the operation of the statute all persons employed on a dredge in furthering its use and operations, no matter what their particular functions might be.

Clearly the act of June 19, 1912 (37 Stat. 137), must receive the same construction. That statute was passed for the purpose of enlarging the scope of the eight-hour law so that it should not be confined to labor on "the public works of the United States," but should apply to all Government contracts generally. It did not, however, purport to enlarge the class of employees entitled to the benefit of the act but limited it, as before, to "laborers or mechanics." These words had, as has been pointed out, received a fixed judicial construction so as not to include "seamen," and the term "seamen" had been held to include all persons serving in any capacity on vessels such as dredges, scows, barges, etc. As Congress deliberately chose to retain the term "laborers or mechanics" in the act of June 19, 1912, after it had been the subject of judicial interpretation, that interpretation must be read into the act, so that persons employed on dredges are no more within the provisions of this later act than they were within those of the earlier act of August 1, 1892.

I have the honor, therefore, to advise you that, under the operation of the act of June 19, 1912, it will not be necessary to report the cases of any persons working more than eight hours a day upon any vessel engaged in dredging under a Government contract, irrespective of whether such persons are connected with the vessel as a part of its crew in its operation and management, or are only employed thereon in the particular work of dredging and handling material.

The act of June 19, 1912, however, provides:

*"Be it enacted*, etc., That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision

that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work \* \* \*."

I am not able to say in advance that a contract for dredging *may not* possibly "require or involve the employment of laborers or mechanics" in some of the stages of its performance. That is a proper matter for decision by the administrative officer in charge, applying the principles of law set out above. Where such officer is in doubt, the wisest course is to insert in the contract the eight-hour restriction required by the act of June 19, 1912, leaving the status of any particular person as to whom question is raised to be determined by the actual facts of his employment.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

---

ASSIGNMENT OF COAL MINING LEASES—COMMODITIES  
CLAUSE OF THE HEPBURN ACT.

The transfer of certain coal-mining leases, which embrace lands in the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in the Indian Territory, now Oklahoma, from the Western Coal & Mining Co. to the Folsom Morris Coal Mining Co., a corporation whose capital stock is owned by the Atchison, Topeka & Santa Fe Railway Co., is not forbidden by the commodities clause of the Hepburn Act (34 Stat. 585).

The railroad company has the right to mine and carry coal for use in its locomotives, since commodities necessary or intended for its use in the conduct of its business as a common carrier are expressly excepted from the operation of the statute.

The application of the commodities clause to the shipment of coal over the Atchison, Topeka & Santa Fe Railway Co. by the Folsom Morris Coal Mining Co. depends upon whether or not the railway company uses the coal company merely as an artificial legal entity which it completely dominates and controls; or whether, although the owner of all its stock, the coal company is operated separately and distinct from the railway company.



As the question under inquiry, although purely hypothetical, deals rather with the establishment of a policy than the determination of a particular case, it is permissible for the Attorney General to call the attention of the Secretary of Commerce and Labor to the state of the law on the subject.

DEPARTMENT OF JUSTICE,

*November 29, 1912.*

SIR: I have your favor of 26th instant, in which you ask my opinion with respect to the legality of the transfer of certain coal-mining leases which you are asked to approve, and which embrace lands in the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in the Indian Territory, now Oklahoma, from the Western Coal & Mining Co., (the present lessee under assignment with your approval, from the Atoka Coal & Mining Co., the original lessee), all of whose capital stock is owned by the Missouri Pacific Railway Co., to the Folsom Morris Coal Mining Co., a corporation, all of whose capital stock is owned by the Cherokee and Pittsburgh Coal & Mining Co., all of whose capital stock is in turn owned by the Atchison, Topeka & Santa Fe Railway Co. (excepting in each case directors' qualifying shares). You further say that, from statements made to you, you are convinced that the Atchison, Topeka & Santa Fe Railway Co. desires control of these mines for the purpose of obtaining a supply of coal to be used in its locomotive engines, largely on account of the prospective shutdown on the supply of fuel oil in the Southwest; and you call attention further to the fact that the parties to the assignment point out that the approval of the assignment will not affect the situation as to railroad ownership, inasmuch as in both cases the stock of each of the mining companies is owned by the railroad company. Upon this state of facts you ask my opinion as to the legality of the proposed assignment.

The specific inquiry arises out of the possible application to the case of the fifth paragraph of the first section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act. That clause is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport

from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." (34 Stat. 585.)

It is to be first noted that the statute has no effect whatever upon the acceptance by the railroad company, directly or indirectly, of a lease or assignment of lease of mining property. The prohibition is against *transportation only*, under the circumstances specified in the act; and the only possible illegality of the transportation, under the statute quoted, would arise if, after the approval by you of the assignment of the lease, coal mined out of the demised premises by the Folsom Coal Mining Co. should be transported over the railroads of the Atchison, Topeka & Santa Fe Railway Co.

Addressing the inquiry to that point therefore, the statute expressly excepts from its prohibition commodities necessary or intended for the use of the railroad company in the conduct of its business as a common carrier. Therefore the railroad company, even if it should itself be the assignee of the lease, might freely mine and carry the coal for its own uses as fuel for its locomotives. The only remaining question, therefore, is whether or not the statute would operate to prohibit the railroad company from transporting over its line coal mined and shipped by the coal company for sale and delivery to any customer other than the railroad company. In view of the statement in your letter as to the main purpose of the assignment, this question is not one actually arising in the course of the business of your Department, and I should perhaps refrain from giving an opinion upon a purely hypothetical question, according to the well-settled rule of the department (28 Op. 129, 239). But as you are dealing rather with the establishment of a policy than the determination of a par-

ticular case, it is permissible to call your attention to the state of the law on the subject under inquiry.

In the cases known as the *Commodities Clause Cases* (reported 213 U. S. 366), the Supreme Court held that the above-cited commodities clause—

“\* \* \* has solely for its object to prevent carriers engaged in interstate commerce from being associated in interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions:

“a. When the commodity has been manufactured, mined, or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity;

“b. When the railway company owns the commodity to be transported in whole or in part;

“c. When the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation.” (213 U. S. 369.)

In the later case of *United States v. Lehigh Valley Railroad Company* (220 U. S. 257) it appeared that after the mandate on the decision in 213 U. S. had been entered in the Circuit Court, the Government asked leave to amend its bill by averring in detail facts which tended to establish that there was no distinction in practice between the coal company and the railway company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause, and that owning all of the stock of the coal company, and thereby controlling its acts, the production, shipment, and

sale of all of the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it were the absolute owner of the same. The Circuit Court refused leave to file this amendment and entered a decree dismissing the bill absolutely upon the allegations of the original bill and answer, which were before the Supreme Court in 213 U. S. The Supreme Court reversed this judgment, holding that the amendment should have been allowed. Referring to the earlier decision, the court said:

“While that decision expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes.” (220 U. S. 271-2.)

In summing up the Chief Justice said:

“\* \* \* in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation, within the prohibitions

of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable." (220 U. S. 274.)

Whether or not in a given case a railroad company has used or employed its stock ownership in another corporation in substance to destroy the entity of that corporation and commingle its affairs in administration with those of the railroad company so as to make the two virtually one, is a question of fact which must be determined by the evidence in that case.

The report in 220 U. S. gives in detail the allegations made in the amendment to the bill there tendered which the Supreme Court accepted as satisfactory *prima facie* proof of such identity. In the case which you have under consideration the determination whether or not the commodities clause as construed by the Supreme Court in 220 U. S. would apply to the shipment of coal over the Atchison, Topeka & Santa Fe road by the proposed assignee of a lease, being a corporation all of whose stock it owns, must depend upon whether or not the railroad company uses the coal company merely as an artificial legal entity which it completely dominates and controls, operating the coal company as an integral part of its own business, the corporation being a mere artificial division of the work which is in effect carried on by the railroad company; or whether, although the owner of all its stock, the coal company is operated separately and distinct from the railroad, and is not used by it merely as a part or department of its general business, and is not in effect a mere device to escape the prohibition of the statute.

Respectfully, yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

DEPUTY CLERKS OF UNITED STATES DISTRICT COURTS—  
PREMIUM ON OFFICIAL BONDS.

Deputy clerks of the district courts of the United States are "officers of the United States" within the meaning of the provision of the urgent deficiency appropriation act of August 5, 1909 (36 Stat. 118, 125), which limits the rate of premium on official bonds of officers and employees of the United States.

DEPARTMENT OF JUSTICE,  
*December 12, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 26th ultimo requesting my opinion on the question whether deputy clerks of district courts of the United States come within the provisions of the urgent deficiency appropriation act of August 5, 1909 (36 Stat. 118, 125).

The portion of the said act to which you refer is as follows:

"Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight: *Provided*, That hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States."

The question submitted by you turns, therefore, on whether a deputy clerk of a district court of the United States is an "officer or employee of the United States."

I entertain no doubt that he is an officer of the United States. The Constitution (Art. II, sec. 2, par. 2), after conferring general power on the President, by and with the advice and consent of the Senate, to appoint officers of the United States, provides: "But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, *in the courts of law*, or in the heads of departments."

In *United States v. Maurice* (2 Brock. 96, 102, 103) Chief Justice Marshall said:

“\* \* \* An office is defined to be ‘a public charge or employment,’ and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is ‘an employment,’ it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed by Government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.”

In *United States v. Hartwell* (6 Wall. 385, 393) the Supreme Court, holding that a clerk in the assistant treasurer’s office at Boston, appointed by that officer, with the approbation of the Secretary of the Treasury, was a “public officer,” said:

“An office is a public station, or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties.

\* \* \* \* \*

“A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

“The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power.”

This decision in so far as it relates to the method of appointment proper and necessary to constitute an officer of the United States is approved in *United States v. Moore*,

95 U. S. 760, 762; *United States v. Germaine*, 99 U. S. 508, 511; *United States v. Perkins*, 116 U. S. 483, 484; *United States v. Mouat*, 124 U. S. 303, 307, 308; *United States v. Smith*, *Ibid.*, 525, 532.

Deputy clerks of the district courts of the United States were, by section 558, Revised Statutes, authorized to be appointed *by the court* on the application of the clerk, but this provision has been repealed by section 297 of the Judicial Code, and section 4 of the said code now provides:

“SEC. 4. Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.”

Since such deputy clerks are, by law, appointed with the approval of the court, there can be no doubt that, in so far as the method of appointment goes, they are appointed *by a court of law*, within the meaning of the Constitution, and are, so far as that point is concerned, officers of the United States (*United States v. Hartwell, supra*).

In addition to the method of appointment, “the term” (office) “embraces the ideas of tenure, duration, emolument, and duties” (*United States v. Hartwell, ubi supra*).

By *tenure* is not meant a holding for a fixed term. Many admitted officers do not so hold. The distinction is between those persons whose services are occasional and temporary,



fixed by some contract of employment, and those whose services are general and indefinite in a line of duty prescribed by law. This is pointed out in *United States v. Maurice*, *ubi supra*. In *United States v. Germaine*, *ubi supra*, the Supreme Court, alluding to *United States v. Hartwell*, said (p. 511) :

“ \* \* \* In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary.”

In *Auffmordt v. Hedden* (137 U. S. 310, 327) the court said of the person there in question :

“ \* \* \* His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an “officer” within the meaning of the clause of the Constitution referred to.”

A deputy clerk has an indefinite tenure given him by law (Judicial Code, sec. 4, *supra*), and in that aspect also fulfills the legal requirements.

The same considerations show that his office has “duration” within the meaning intended by the Supreme Court. It is not limited to any exceptional or occasional emergencies, nor fixed by contract.

His “emolument” is regulated by section 561, Revised Statutes, which provides :

“Sec. 561. The compensation of deputies of the clerks of the district courts shall be paid by the clerks, respectively, and allowed in the same manner that other expenses of the clerks’ offices are paid and allowed.”

Since he is thus paid by the clerk and not by the United States, there is no privity of contract between himself and the Government *as to the matter of compensation*, and, hence, he is not an “employee” of the United States (*United States v. Meigs*, 95 U. S. 748; *Douglas v. Wallace*, 161 U. S. 346, 348; *Bollin v. Blythe*, 46 Fed. 181, 182; *United States v. McDonald*, 72 Fed. 898; *Matthews v. United States*, 35 Ct. Cls. 595, 600; *Matthews and Gunn v. United States*, 32 Ct. Cls. 123, 133). Nevertheless, the money to pay the deputy comes from the fees charged by the clerk

under section 828, Revised Statutes, for performing services required by law in the administration of justice, which fees are accounted for to public officials (Revised Statutes, secs. 833, 839), and the surplus of which, after payment of his deputies and other office expenses, must be accounted for to the Treasury of the United States (Revised Statutes, sec. 844).

A deputy marshal has been held to be an officer of the United States though his compensation is derived in the same manner as that of the deputy clerk (*United States v. Tinklepaugh*, 3 Blatch. 425, 430; *United States v. Martin*, 17 Fed. 150, 153; *Bollin v. Blythe*, *supra*), and this view of the status of a deputy marshal evidently has the sanction of at least three justices of the Supreme Court (*United States v. Matthews*, 173 U. S. 381, 387, 389).

Therefore, though there be no privity of contract between the deputy clerk and the Government *as to his emolument*, yet that emolument is, in fact, derived from public funds, and this seems clearly sufficient to meet the requirements as to a public office in this respect.

The "duties" of a deputy clerk are such portion of the clerk's own duties as the latter may depute to him (A. & E. Encyc., 2d ed., vol. 9, p. 370). These acts he may do in his own name as deputy. In *The Confiscation Cases*, 20 Wall. 92, 111, the warrant, citation, and monition were signed by the deputy clerk. The court held:

"\* \* \* This was sufficient. An act of Congress authorized the employment of the deputy, and in general, a deputy of a ministerial officer can do every act which his principal might do."

A deputy clerk takes the same oath as the clerk, namely, "That I will truly and faithfully enter and record all the orders, decrees, judgments, and proceedings of the said court" (Revised Statutes, sec. 794). Such duties amply come up to the measure of the duties of a public officer. Moreover, the bond of the deputy for the performance of his said duties runs, like that of the clerk, to the United States (Revised Statutes, sec. 796).

Moreover, in at least two enactments of Congress the deputy clerk is spoken of as holding an office. This alone

598 *Army Officers Promoted by Recess Appointment.*

was deemed sufficient in *United States v. Tinklepaugh, supra*, to constitute a deputy marshal a public officer.

(1) The deputy clerk takes the same oath, substantially, which is prescribed generally for officers of the United States by section 1757, Revised Statutes, namely, "That I will faithfully and impartially discharge and perform all the duties of *my said office*" (Revised Statutes, sec. 794). None but officers take such an oath (12 Op. 521).

(2) By section 748, Revised Statutes (which, though repealed, apparently, by sec. 297 of the Judicial Code, may still be looked to on this point), the deputy clerk is forbidden to practice as an attorney in any cause pending in any district "for which he is acting as such officer."

I have the honor, therefore, to advise you that deputy clerks of district courts of the United States come within the provisions of the act of Congress approved August 5, 1909 (36 Stat. 118, 125).

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

---

STATUS OF ARMY OFFICERS PROMOTED BY RECESS APPOINTMENT.

The acceptance by an Army officer of a recess appointment is provisional only and leaves to the officer a reversionary right to his former office in case his new appointment is not confirmed by the Senate.

An Army officer who accepts a recess promotion and thereafter becomes eligible for retirement by reason of age before the adjournment of Congress and before the appointment is acted upon by the Senate, is entitled to the rank of his new appointment.

DEPARTMENT OF JUSTICE,  
*December 14, 1912.*

SIR: I have the honor to comply with the request in your note of December 9, 1912, for an opinion upon the questions there stated, as follows:

"1. Whether in the case of any of the officers promoted by recess appointment as set forth in said report, if the nomination shall fail of confirmation by the Senate during

its present session, the particular officer will revert at the expiration of his recess appointment to the office from which promoted in view of the system of promotion by seniority and of the statutes referred to in said report, which appear to establish the principle of continuous service in the Army either on the active or retired list;

"2. Whether, if the nomination of Gen. McClelland shall not be acted on by the Senate prior to December 29, 1912, when he shall reach the age of 64 years, he may then be placed on the retired list; and, if such action be taken, whether his status as an officer on the retired list will not be just as permanent as if he held at the time of retirement a permanent commission in the Army."

The "report" above referred to is a report made in this case to the Secretary of War by the Judge Advocate General upon the questions involved in your request and is attached to your letter of December 9.

The status on the active list of the Army of officers promoted by recess appointment, not confirmed by the Senate, depends upon whether or not the acceptance of such a recess appointment by an officer operates as a resignation or permanent vacation of the former office from which the officer was promoted; *or*, amounts only to a provisional or conditional vacation of the former office, depending for its permanency upon the confirmation in the new office by the Senate, thus leaving to the promoted officer a reversionary right to return to his former office if his promotion is not confirmed.

If the first alternative is the correct one, then, if the recess appointment be not confirmed, the officer is out of service, having resigned or vacated the only office which he held and failed to obtain confirmation to that to which he was nominated.

This would violate not only the fundamental idea of continuous service and promotion in the order of seniority but would be in direct violation of article 99 of the Articles of War, which provides that:

"In time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; \* \* \*."

No special importance is attached to the particular word "dismissed" as here used. Any form of removal of an officer from his office without his consent is a dismissal.

This reasoning would seem to preclude the idea that the acceptance of such a promotion constitutes a permanent resignation or vacation of the former office; and it can not be well said that, by acceptance of a recess promotion, an officer consents to his removal from office and from the service, if it be not confirmed by the Senate.

It is true that the other alternative above suggested—that the recess promotion amounts to a conditional vacation of the original office held with a reversionary right in the office held at the time of promotion, dependent upon the failure of confirmation in the new office—is not wholly satisfactory, and yet seems to me to present the only practical solution of the problem.

The authorities upon this subject, including the action of Presidents and the Secretary of War, are not harmonious, and the question is not considered as settled.

These authorities, including the statutes bearing upon the subject, are fully cited and commented upon in the memorandum of the Judge Advocate General submitted in this case, and they need not be again cited here. I content myself with a reference to them and the expression of my opinion as a conclusion from them and from a view of the whole subject.

One of the objections to holding that such recess appointment is but a provisional vacation of the former office, as above suggested, arises from the act requiring promotions to be made in the order of seniority, if the officer next in line is qualified, and from the practice of Presidents and the War Department in conformity therewith.

In case of such a promotion the officer next in seniority, if qualified, would be promoted to fill the vacancy thus created, and then the next one, and so on down the line. Then, if the vacation of the office by the officer first thus promoted be but provisional and dependent upon his confirmation, so also would be those of the succeeding officers.

It might happen that the Senate should adjourn without confirming the appointment of an officer promoted to a

higher grade, while confirming that of a junior officer nominated to the office which the senior officer had held. This, if effectual, would put the officer whose promotion was not confirmed out of office and out of the service, despite the provisions in the statute above referred to.

But such a case can hardly be supposed; the injustice of the case would certainly restrain the Senate from taking action which would have that result.

The objections to the construction that the acceptance of a recess appointment is provisional only and leaves to the officer a reversionary right to his former office in case his new appointment is not confirmed, do not in my opinion outweigh the express prohibition of the 99th Article of War and the long and uniform practice of the War Department in conformity therewith, that no officer can be removed from office except in pursuance of the sentence of a court-martial or in mitigation thereof.

Your remaining question relates to the retirement of Gen. McClernand and as to his status on the retired list of the Army. This question seems a more difficult one than the former.

Gen. McClernand was given and accepted a recess appointment which has not been confirmed or acted upon. This, I assume, was an appointment by way of promotion to a higher office. On December 29, 1912, he will have reached the age of 64 years, the age at which officers are retired from the active service and placed on the retired list of the Army.

If before that date the Senate should confirm his recess appointment, there would be no question remaining, as he would then be placed on the retired list with the rank and grade of his new appointment, under the section of the Revised Statutes next cited.

But if this appointment should fail of confirmation, he will be placed on the retired list; but the question will be as to his status on that list. Will he be retired with the rank of his unconfirmed recess appointment, or with the rank of the office from which he had been appointed? For he can not be retired without some rank or grade.

Section 1254 of the Revised Statutes provides that:

“Officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement.”

This still leaves in this case the question of what is the actual rank which will be held by Gen. McClernand at the date of retirement. Will it be the rank of his recess appointment, or that of the office which he formerly held?

The “actual rank” held by Gen. McClernand at the date of retirement is that of the office which he holds at such date. He will not then hold the rank of his former office, for he has accepted an appointment to another office; and he can not hold both. While if he is not confirmed he falls back into his former office, as I have just held, until that event happens his actual office is that to which he has been appointed by the President under his constitutional power to fill offices where vacancies exist during the recess of Congress.

It must be taken as true that all such recess appointments, while they continue in force, confer an absolute title to the office named and to the rank thereof, and that such appointments do continue until rejected by the Senate or the Congress adjourns without any action being taken thereon. This being so, if, on December 29, 1912, when Gen. McClernand reaches the age of retirement, the Senate has not rejected his nomination and Congress has not adjourned,<sup>1</sup> his recess appointment will be in full force, conferring an absolute title to the office and rank thereof, and that will be the only office which he will then hold; hence, if then retired, such appointment will determine the rank at which he shall be retired.

I am therefore of the opinion that each of your questions should be answered in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

---

<sup>1</sup> The usual holiday recess is not an adjournment ending a session within Const., Art. II, sec. 2, par. 3.

IMPORTATION OF OPIUM—FORFEITURE.

Section 2 of the act of February 9, 1909 (35 Stat. 614), authorizes the summary destruction, without judicial proceedings, of opium imported into the United States in violation of section 1 of said act.

DEPARTMENT OF JUSTICE,

*December 21, 1912.*

SIR: I have the honor to acknowledge the receipt of your letter of the 25th ultimo in which you state that the collector of customs at Port Townsend, Wash., has under seizure 5 pounds of yen shee, a preparation of *smoking* opium, valued at \$50, and various other seizures of *smoking* opium, the value of which in each case is less than \$500, all of which were seized for violation of section 2 of the act of February 9, 1909 (35 Stat. 614), in that said opium was introduced into the United States contrary to law. You request my opinion whether said opium may be summarily forfeited under the provisions of sections 3074 et seq. of the Revised Statutes, or whether the only lawful procedure is by way of judicial condemnation.

The act of February 9, 1909, *supra*, is entitled "An act to prohibit the importation and use of opium for other than medicinal purposes," and provides:

"*Be it enacted, etc.*, That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"SEC. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been im-



ported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Sections 3074 to 3080, inclusive, of the Revised Statutes, deal with "cases of seizure of property subject to forfeiture for any of the causes named in any provision of law relating to the customs, or for the registering, enrolling, or licensing of vessels, when, in the opinion of the collector or other principal officer of the revenue making such seizure, the value of the property seized does not exceed \$500." They provide for an appraisalment of the property (sec. 3074), a notice by publication of the seizure (sec. 3075), the protection of the claimants (sec. 3076), the sale of the property at public auction and the deposit of the proceeds of sale (sec. 3077), the remission of the forfeiture under certain circumstances (sec. 3078), the distribution of the proceeds (sec. 3079), and the sale of perishable articles or articles the expense of whose keeping would be disproportionate (sec. 3080).

These sections, it is clear, are confined in their application to violations of the customs or navigation laws, and have no bearing on cases not falling within those laws. The act of February 9, 1909, while it provides by section 1 for the collection of revenue on opium, other than smoking opium, imported for medicinal purposes, is not, in its application to *smoking* opium and the forfeiture thereof, a customs or navigation law, but is a prohibitory statute enacted by virtue of the police powers of the United States. It does not contemplate the sale of opium seized for violation of its provisions, but its destruction, so that, clearly, the provisions of sections 3077 to 3080, inclusive, of the Revised Statutes, can not be availed of.

In *United States v. Caminata* (194 Fed. 903) the opium was seized on Delaware Bay before the vessel reached the customs. Counsel for the Government contended that the act of February 9, 1909, *supra*, was not a customs act but a prohibitory statute, and that, therefore, the offense was complete when the opium was brought within the territorial limits of the United States, whether it had reached the customs line or not, so that the case of *Keck v. United States* (172 U. S. 434) did not apply. Judge McPherson said (194 Fed. 905):

“I agree with this reasoning, and hold:

“(1) That the offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by an offender within the territorial limits of the United States. The offense is then complete, although the opium may not have been landed from a ship, or been carried across the customs lines.”

See also *Williams v. United States* (168 U. S. 382, 387, 388).

I am of the opinion, therefore, that sections 3074 et seq., of the Revised Statutes have no application to opium seized under the provisions of section 2 of the act of February 9, 1909.

For the same reasons section 3460 of the Revised Statutes, relating to the summary procedure in the forfeiture of goods seized for violation of the provisions of the internal-revenue laws, is likewise inapplicable.

The power of Congress to provide for the summary destruction of articles imported or transported in violation of valid police laws is now established beyond question. In the leading case of *Lawton v. Steele* (152 U. S. 133), the Supreme Court held the summary destruction of fish nets unlawfully maintained in the waters of the State of New York to be a valid exercise of the police power of the State. In its opinion the court said (152 U. S. 140, 141):

“\* \* \* But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary

abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark Railway v. Hunt*, 50 N. J. Law, 308; *Blasier v. Miller*, 10 Hun, 435; *Mouse's Case*, 12 Rep. 63; *Stone v. New York*, 25 Wend. 157, 173; *Am. Print Works v. Lawrence*, 21 N. J. Law, 248; 23 N. J. Law, 590.

"It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room."

In *Buttfield v. Stranahan* (192 U. S. 470, 497) the court sustained a statute of the United States which provided for the destruction, under certain conditions, of imported tea falling below a certain standard of quality.

In *Sentell v. New Orleans, etc., Railroad Co.* (166 U. S. 698, 705) the court said:

"It is true that under the fourteenth amendment no State can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. As was said in *Jenkins v. Ballantyne*, 8 Utah, 245, 247, 'The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action and process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such as to render judicial inquiry and consideration impracticable.'"

In *North American Cold Storage Company v. Chicago* (211 U. S. 306, 315) the court said:

"\* \* \* We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary. The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it \* \* \*."

(See also *Public Clearing House v. Coyne*, 194 U. S. 497, 510; *Hipolite Egg Company v. United States*, 220 U. S. 45; *Conway v. Stannard*, 17 Wall. 398; 22 Op. 70.)

It being clearly, therefore, within the power of Congress to provide for the summary destruction, without judicial proceedings, of articles brought into this country contrary to law, the question remaining is whether, in the particular enactment whose violation is claimed, the legislature has shown an intent to take this course, or to allow the matter to be determined by the courts. Each case must stand upon its own bottom, for the nature and purpose of the law, the evil to be combated, the character of the articles seized, the practical results of one construction or another, are all proper matters of consideration, and must necessarily vary considerably. Where the statute in question is not specific as to the procedure to be adopted, the surrounding circumstances may disclose a case apt for judicial determination, or, on the contrary, may present a case where compulsory recourse to judicial condemnation would nullify the statute. These considerations are illustrated in the case submitted by you.

The act of February 9, 1909, begins by absolutely prohibiting the importation of opium or any preparation or derivatives thereof. It then excepts opium imported for medicinal purposes, other than smoking opium, and authorizes the Secretary of the Treasury to prescribe regulations to govern the importation of opium for medicinal purposes. Such regulations, providing for the entering in bond of medicinal opium at certain designated ports, for a declaration of the owner or consignee, and for the minimum weight of packages, have been duly promulgated (T. D. 29657).

Section 2 of the act of February 9, 1909, then provides that, if any person shall fraudulently or knowingly import or bring into the United States any opium, etc., contrary to law, "such opium or preparation or derivative thereof shall be forfeited and shall be destroyed." It further makes possession of the opium *prima facie* evidence of guilt.

The words quoted above, "shall be forfeited," do not, *ex necessitate*, mean forfeiture by judicial proceedings. Their meaning must be determined by balancing the following considerations:

(1) In the first place, as said by Attorney General Knox in the Fur-Seal Case (24 Op. 577, 578) :

“ \* \* \* Undoubtedly the prohibition is intended to be rigorous and absolute in support of the policy of the Government for the protection of fur seals, and the inference that the seizure and destruction shall be by summary executive action rather than under judicial proceedings is manifestly strong. Nevertheless, the statute is not explicit upon the point, and the view indicated is reached by implication. As rights of person and property are involved, an implied authority which is summary and might be arbitrary is not to be lightly assumed. The inferences should not only be persuasive but irresistible.

“ It is a fundamental proposition of law that every person charged with an offense or a liability shall have his day in court; that no man shall be deprived of his property without due process of law. While executive determination of rights of property and person has been sustained as due process of law when it was the express and manifest intention of Congress to confer such authority upon administrative officers, it may be safely presumed that without such clear intent judicial proceedings are necessary for the determination of these rights.”

The above remarks, however, are to be taken with the qualification, enlarged upon below, that property rights in things which are nuisances *per se* are not so extensive nor so fully protected as are those in articles ordinarily used for lawful purposes. (166 U. S. 700, 701.)

(2) To require judicial condemnation in *every* case of opium seized for violation of the act of February 9, 1909, would evidently nullify that portion of the act, and, to that extent, defeat the legislative intent. Opium imported for smoking purposes, in evasion of law, is, I assume, as a general thing, imported in small packages easily concealed. One seizure may cover a number of such packages in the possession of different persons. To require a libel in each individual case, with the consequent delay and expense, would put such a burden on the administrative officers as to break down the execution of the law and render its enforcement impossible as a practical matter. On the

other hand, the importer may always question the decision of the executive officer by judicial proceedings, and will undoubtedly do so, if his case justify such a procedure.

(3) There is an entire distinction as to the propriety of summary destruction between articles which are nuisances *per se* and articles of a lawful character but brought within the ban of the law by some collateral circumstance. (Freund on Police Power, secs. 520, 521, 525.) Opium belongs to the former class. It is a noxious drug fitted by nature to do harm to the community. It is, in and of itself, a menace. It belongs to the class of things which "carry their own identification as contraband of law" (220 U. S. 57), "which are outlaws of commerce." (Ibid. 58.) The regulations of the Secretary of the Treasury have clearly separated, as a practical matter, opium which can lawfully be imported for medicinal purposes from all other opium whose importation is absolutely prohibited, and I am informed on the highest authority that it is quite impossible, as a practical matter, to mistake the one for the other. No judicial inquiry is needed, therefore, to determine whether any particular seizure falls within the one class or the other. This feature distinguishes the case submitted by you from the case of the fur-seal skins decided by Attorney General Knox. Such skins are not harmful *per se*, and their importation is rendered unlawful only by the collateral fact that they were taken in certain waters, and not on the Pribilof Islands nor under the privilege accorded by a former statute to certain Indians. When, therefore, fur-seal skins are seized by an officer of the United States, there will be nothing in the immediate circumstances surrounding their importation which will determine their liability to such seizure. The question whether the skins have been taken in certain waters, and, if in such waters, whether they fall within the exceptions made by sections 6 and 7 of the act of December 29, 1897, are questions eminently fitted for judicial, and not executive determination, nor would any emergency exist which would necessarily require summary action. Quite different is the situation in regard to opium. Whether the importation be for medicinal purposes, or be of the character which is wholly prohibited, can be determined by the

immediate facts surrounding the importation. *Res ipsa loquitur*. And the harmful nature of the article is such that nothing but its immediate destruction will effectively prevent the evils flowing from its importation.

(4) It may be said that the act of February 9, 1909, is a penal statute, and, therefore, to be strictly construed. This is undoubtedly true of that portion of the second section which provides for a fine or imprisonment of an offender. On the other hand, the provision regarding the forfeiture and destruction of the opium itself would not at the present day (whatever the ancient law may have been) be regarded as penal but remedial, since it provides an additional and efficacious remedy for *preventing* the great evil denounced by the statute. It should, therefore, receive a beneficial construction, with the purpose to carry out, as far as possible, the general object Congress had in mind as disclosed by the statute, namely, the suppression of the opium traffic. It is now settled that revenue laws providing for forfeitures are to be beneficially construed (*United States v. Stowell*, 133 U. S. 1, 12).

In *Johnson v. Southern Pacific Company* (196 U. S. 1, 17) the Supreme Court said:

"The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor v. United States*, 3 How. 197; *United States v. Stowell*, 133 U. S. 1, 12, and cases cited. And see *Farmers' and Merchants' National Bank v. Dearing*, 91 U. S. 29, 35; *Gray v. Bennett* 3 Met. (Mass.) 522."

In 18 Op. 246, 248, Attorney General Garland said, of revenue statutes:

"It is to be said, as a general rule in matters of this kind, that the construction of these statutes must be such



as is most favorable to their enforcement. There is no liberal interpretation in favor of the individual to be indulged in; but, as statutes for the accomplishment of great public purposes, they must be construed in a manner to reach those purposes, and to carry out the intention of the legislature in passing them. \* \* \*

To the same effect is the language of Lord Kenyon in *Turtle v. Hartwell* (6 T. R. 426, 429), quoted with approval by Maxwell (*Interpretation of Statutes*, 4th ed. p. 101):

“In expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit.”

The additional remedy which Congress added in the act of February 9, 1909, was that relating to the *destruction* of the forfeited opium, and this addition to the remedy was coupled with the equally significant omission of the express provisions of prior and other acts relating to a condemnation by judicial process. It is this new remedy by way of destruction, with the omission to provide for judicial condemnation, which is to be beneficially construed so as effectively to carry out the general purpose of Congress.

The act of February 23, 1887 (24 Stat. 409), prohibited the importation of opium into the United States by subjects of the Emperor of China, and section 2 thereof provided that opium imported contrary to the statute “shall be deemed forfeited to the United States; and proceedings for the declaration and consequences of such forfeiture may be instituted in the courts of the United States as in other cases of the violation of the laws relating to other illegal importations.”

The tariff act of October 1, 1890 (26 Stat. 567), which levied a customs duty of \$12 per pound on smoking opium (*ibid.* 569, par. 48), also levied an internal-revenue tax on smoking opium manufactured in the United States (sec. 36), provided that smoking opium imported into the United States should be stamped to denote that the duty was paid (sec. 38), and that for a violation of these provisions said smoking opium “shall be forfeited” (sec.

40). This latter section was amended by the act of March 3, 1897 (29 Stat. 695), by adding, after the word "forfeited," the following:

"\* \* \* and may be sold to the highest bidder, pursuant to the provisions of section thirty-four hundred and sixty, Revised Statutes, if not valued as therein provided at over five hundred dollars; but if valued at more than five hundred dollars the sale shall be made pursuant to the judgment of the court in the proceedings for condemnation or forfeiture."

Moreover, section 2 of the act of February 9, 1909, was redrafted from section 3082, Revised Statutes (Cong. Rec., 60th Cong., 2d sess., p. 1681). Section 3082, Revised Statutes, however, merely provides that the merchandise shall be forfeited, and it does not contain the significant addition that it "shall be destroyed."

These provisions of law show that, prior to the enactment of the act of February 9, 1909, where what was contemplated was the *sale*, not the *destruction*, of the opium, Congress had always provided for a process by judicial condemnation or by judicial condemnation concurrently with summary proceedings. Opium was regarded in the light of a commercial import, and, naturally, when unlawfully imported, its disposition was dealt with as in the case of other unlawful importations. When, however, its importation was entirely prohibited for reasons which are patent, its *destruction* was decreed, and the provisions as to judicial proceedings were dropped, and it is a fair presumption that these changes were intentionally made because of the entire change in the nature of the enactment and of the purpose which Congress had in view, requiring a more efficacious remedy. Bearing in mind, then, this evident change in the purpose of Congress from mere regulation to absolute prohibition, with its concomitant change to the bare enactment that the opium "shall be destroyed," it fairly follows that a construction which called for a condemnation by judicial proceedings would not be beneficial. If the Government proceeded by way of a libel *in rem* against seized smoking opium, no question, evidently, could be raised in the case except one,

namely, is or is not the article smoking opium. There could be no question of title, or of criminal intent, or of mistake. Such matters are irrelevant under the drastic provisions of the statute. Questions which could be, and are, raised in cases of condemnation of property seized for violation of the customs or navigation laws would have no place in such a proceeding. Such being the case, it is not to be supposed that Congress intended to require the submission to solemn judicial inquiry of the question whether the thing seized is smoking opium, a matter which can be determined on mere inspection by any collector of customs familiar with his duty.

Giving full weight to each of the foregoing considerations, I have reached the conclusion that section 2 of the act of February 9, 1909, authorizes the summary destruction, without judicial proceedings, of opium imported in violation of section 1.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

---

DEPUTY COLLECTORS OF INTERNAL REVENUE—TENURE  
OF OFFICE.

The term of office of deputy collectors of internal revenue expires automatically upon the appointment of a successor to their own collector, and this limitation of tenure is not affected by section 6 of the act of August 24, 1912 (37 Stat. 555).

In order to continue in office after the appointment of a successor to their own collector, deputy collectors must be affirmatively reappointed and recommissioned.

DEPARTMENT OF JUSTICE,  
*January 3, 1913.*

SIR: I have the honor to reply to your note of November 6, 1912, requesting my opinion on the question stated in a letter dated November 6, 1912, addressed to you by the United States Civil Service Commission.

## INDEX—DIGEST.

---

[See also Index to Subjects, p. xxi.]

### ACCOUNTS.

OF DECEASED DEPOSITORS. *See* POSTAL SAVINGS SYSTEM, 17, 18.

### AGRICULTURE, SECRETARY OF.

AUTHORITY TO GRANT RIGHTS OF WAY. *See* FOREST RESERVES.

AUTHORITY TO MAKE REGULATIONS AND REVIEW FINDINGS OF FACT. *See* FOOD AND DRUGS ACT, 1, 2, 3.

AIR RIFLES. *See* ARMS AND MUNITIONS OF WAR, 8.

### ALASKA.

The Title to a School Building in the Town of Petersburg, Alaska, which was constructed out of the "Alaska fund" under section 5 of the act of January 27, 1905 (33 Stat. 617), can not be transferred from the Government to the town of Petersburg except by an act of Congress. 272.

ALASKA FISHERIES, CHIEF OF DIVISION. *See* COMMERCE AND LABOR, SECRETARY OF, 1.

FUR-SEAL FISHERIES SERVICE, APPOINTMENTS. *See* PRESIDENT, 1.

SALMON FISHERIES SERVICE, APPOINTMENTS. *See* PRESIDENT, 1.

ALIENS. *See* ATTORNEY GENERAL, 3; COPYRIGHT LAWS, 2, 3, 4, 5, 6; PORTO RICO, 8.

### APPOINTMENTS.

AGENTS, ALASKA SALMON FISHERIES SERVICE. *See* PRESIDENT, 1.

AGENTS, ALASKA FUR-SEAL FISHERIES. *See* PRESIDENT, 1.

CHEMIST, ASSISTANT, STANDARDS BUREAU. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

CHIEF, DIVISION OF ALASKA FISHERIES. *See* COMMERCE AND LABOR, SECRETARY OF, 1.

DEPUTY COMMISSIONER OF FISHERIES. *See* PRESIDENT, 2.

ENGRAVER AND ELECTROTYPY, COAST AND GEODETIC SURVEY. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

LABORATORY ASSISTANT, STANDARDS BUREAU. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

LOCAL AGENT, SEATTLE, WASH., FISHERIES BUREAU. *See* COMMERCE AND LABOR, SECRETARY OF, 3.

NATURALIST, FUR-SEAL FISHERIES. *See* COMMERCE AND LABOR, SECRETARY OF, 2.

PHOTOGRAPHER, COAST AND GEODETIC SURVEY. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

**APPOINTMENTS—Continued.**

PHYSICIANS, FUR-SEAL FISHERIES. *See* COMMERCE AND LABOR, SECRETARY OF, 2.

PHYSICISTS, ASSISTANT AND ASSOCIATE, STANDARDS BUREAU. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

RECESS APPOINTMENTS. *See* ARMY, 3, 4.

**ARANSAS LIFE-SAVING STATION.**

1. **Acquisition by the United States of Site.**—Under the provision in the act of March 3, 1875 (18 Stat. 372), which authorizes the Secretary of the Treasury to acquire, by donation or purchase, the right to use and occupy sites for life-saving stations, the fee-simple title to land may be purchased for the Aransas life-saving station provided for by the act of June 18, 1878 (20 Stat. 163). 48.
2. **Same—Appropriation.**—The language of the provision in the sundry civil appropriation act of June 25, 1910 (36 Stat. 711), out of which payment must be made for the acquisition of land for the Aransas life-saving station, justifies the purchase of said land from that appropriation. 51.

**ARID LANDS.** *See* RECLAMATION OF ARID LANDS.

**ARMS AND MUNITIONS OF WAR.**

1. **Arms and Munitions of War—Defined.**—The words “arms or munitions of war,” within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to any American country in which conditions of domestic violence are found to exist, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. 375.
2. **Same.**—Such articles as come within the definition of “arms or munitions of war” are herein enumerated. *Ib.*
3. **Same.**—Foodstuffs, ordinary clothing, and ordinary articles of peaceful commerce are not included in the prohibition. *Ib.*
4. **Eight-hour Law—Ammunition.**—The practical meaning of the word “ammunition” as used in the proviso in the fortification act of June 6, 1912, under the heading of “Armament of fortifications,” is much for the determination of the departments for which it is especially intended, and as this proviso is mainly for the guidance of the War and Navy Departments and those purchasing material for them, it may well be taken that the generally accepted meaning of the word in these departments was the one intended.
5. **Same.**—Ammunition means something different from materials for ammunition. It is generally the assembled or practically complete product, substantially ready for use in firearms.

**ARMS AND MUNITIONS OF WAR—Continued.**

6. **Dominican Republic—Exportation Prohibited.**—The President's proclamation of October 14, 1905 (34 Stat. 3183), prohibiting the export of arms, ammunition and munitions of war to the Dominican Republic, pursuant to a joint resolution of April 22, 1898 (30 Stat. 739), is still operative under the amended joint resolution of March 14, 1912. 387.
7. **Mexico.**—The exportation of saddles, bridles, canteens, and carbine scabbards by merchants in the United States to other merchants in Mexico falls within the purview of the President's proclamation of March 14, 1912, prohibiting the export of arms or munitions of war to that country. 394.
8. **Same—Exportation of Air Rifles.**—Paper caps for toy cap pistols could hardly be considered within the prohibition of the President's proclamation of March 4, 1912, issued pursuant to the joint resolution of the same date, forbidding the exportation of arms and munitions of war to Mexico, whereas air rifles might well be regarded within the prohibition. The question, however, is one of fact, dependent upon the character of the articles sought to be imported. 570.
9. **Same—Exportation of Gun Grease.**—Gun grease is within the prohibition of the President's proclamation of March 14, 1912, issued pursuant to the joint resolution of the same date, forbidding the exportation of arms or munitions of war to Mexico. 414

**ARMY.**

1. **An expert accountant in the Inspector General's Department is not entitled to be placed on the retired list on the ground that he has reached the age of 64 years because he is not an officer of the Army within the meaning of the statutes of the United States conferring the privilege of retirement.** 249.
2. **Officers.—Acceptance of Office in State National Guard.**—An officer on the active list of the Regular Army may accept the office of colonel in the National Guard of a State, without violating the provisions of section 1222 of the Revised Statutes. 298.
3. **Officers.—Status when Promoted by Recess Appointment.**—The acceptance by an Army officer of a recess appointment is provisional only and leaves to the officer a reversionary right to his former office in case his new appointment is not confirmed by the Senate. 598.
4. **Same.—An Army officer who accepts a recess promotion and thereafter becomes eligible for retirement by reason of age before the adjournment of Congress and before the appointment is acted upon by the Senate is entitled to the rank of his new appointment.** *Ib.*
5. **Same.—Commission in Name of Deceased Army Officer.**—A commission as major of Cavalry can not be lawfully issued in the name of an officer of the Army whose death occurred after he was nominated to that grade by the President but prior to the time the nomination was confirmed by the Senate. 254.

**ARMY**—Continued.

6. **Same.**—It is essential to the creation of such office that there should be an appointment by the President in addition to a nomination to, and consent by, the Senate. *Ib.*
7. **Same.**—An officer of the United States Army or of the Marine Corps, retired from active service only, and not wholly retired from service, is an officer in the employ of the Government, and so within the prohibition of section 1782 of the Revised Statutes. 397.

GOODS IMPORTED FOR ARMY. *See* PHILIPPINE ISLANDS, 3.

QUITCLAIM DEED BY CHIEF ENGINEER. *See* DISTRICT OF COLUMBIA, 5.

**ARTAU, MIGUEL ROSES.**

NATURALIZATION. *See* PORTO RICO, 8.

**ATCHISON, TOPEKA & SANTA FE RAILWAY CO.** *See* COMMODITIES CLAUSE OF HEPBURN ACT, 1, 2, 3.

**ATLANTIC & PACIFIC RAILROAD CO.** *See* RAILROAD LAND GRANTS, 1, 2.

**ATTORNEY GENERAL.**

1. **Claims for Payment for Labor and Material.**—**Hypothetical Question.**—The Attorney General declines to express an opinion as to what, if any, steps must be taken under the proviso by the contracting officer, and what is the status of claims presented for payment for labor and material furnished under a contract, in the event that a contractor who had actually announced an eight-hour workday before obtaining his contract should afterwards for any reason revert to a longer workday, as the question is hypothetical. 488.
2. **Commodities Clause of the Hepburn Act.**—The question whether the commodities clause would apply to the shipment of coal over the Atchison, Topeka and Santa Fe Railway Co. by the Folsom Morris Coal Mining Co., although purely hypothetical, deals rather with the establishment of a policy than the determination of a particular case, and hence it is permissible for the Attorney General to call the attention of the Secretary of Commerce and Labor to the law on the subject. 587.
3. **Naturalization.**—The Attorney General declines to give an official opinion upon the question whether an objection made to the naturalization of an alien should have been sustained, as no case involving that question is now pending before the Department requesting it, and for the further reason that the question is a judicial one. 99.
4. **Same.**—**Hypothetical Question.**—The Attorney General also declines to answer the question whether an appeal would lie from the judgment of a naturalizing court to one of the higher courts of North Dakota, for same reasons and for the additional reason that the question relates merely to a hypothetical case. *Ib.*

**ATTORNEY GENERAL**—Continued.

5. **Nonreservation Schools.—Indian Country.**—The question as to whether lands used for Indian schools, but not within Indian reservations, may be considered as Indian country for the purposes of the enforcement of the act of January 30, 1897 (29 Stat. 506), whereby it is made an offense to introduce liquor into the Indian country, is essentially judicial in character and is not one arising in the administration of the Interior Department, and therefore it would be improper for the Attorney General to give an official opinion thereon. 226.
6. **Partial Payments Under Government Contract.**—The Attorney General declines to answer the question whether the Navy Department would be justified in continuing to make partial payments under contracts in the event of the repeal of the clause in the naval appropriation act of March 4, 1911 (36 Stat. 1267), which authorizes the Secretary of the Navy to make partial payments on work done under contracts for public purposes, as no case involving that question is now pending before that department. 46.
7. **Same.**—The general rule would seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments. *Ib.*
8. **Return of Government Contract.**—While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. 293.

**BALBOA.**

FOREIGN PORT. *See* OCEAN MAIL SERVICE, 3, 4.

**BANKS.**

AUTHORITY TO TRANSACT BANKING BUSINESS. *See* POSTAL SAVINGS SYSTEM, 11, 12.

FOR SAVINGS DEPOSITS. *See* PORTO RICO, 1.

PRIVATE, INDIANA. *See* POSTAL SAVINGS SYSTEM, 15.

**BARAC RIVER.** *See* PHILIPPINE ISLANDS, 5.**BIDS AND ESTIMATES.** *See* GOVERNMENT PRINTING OFFICE, 1, 2.**BOATS, MOTOR.** *See* MOTOR BOATS.**BONDS.** *See* INTERIOR, DEPARTMENT OF; OFFICIAL BONDS; PHILIPPINE ISLANDS, 4; PORTO RICO, 2, 3, 4, 5, 6, 7; POSTAL SAVINGS SYSTEM, 8, 9, 10, 13, 14, 16, 19, 20.



**BRANCH BANKS.**ESTABLISHMENT. *See* NATIONAL BANKS, 6, 7.**BRIDGES.**

1. **Alteration of Metropolitan West Side Elevated Railway Co. Bridge in Chicago, Ill.**—The widening of the channel of the South Branch of the Chicago River by the sanitary district of Chicago, under licenses granted by the Secretary of War, does not connect the Federal Government with that project in such a way as will authorize the Secretary of War, under section 18 of the act of March 3, 1899 (30 Stat. 1153), to require the alteration of the bridge of the Metropolitan West Side Elevated Railway Co. until the widening of the channel and the removal of the filled-in land adjoining the west abutment of the bridge has caused that structure to become an actual obstruction to the free navigation of the river. 139.
2. **Same.**—Filled-in land is subject to the servitude of navigation, and any obstruction to navigation arising therefrom could be abated by Congress, even if made under authority of a State. *Ib.*
3. **Same.**—The filled-in land occupied by the west abutment of the bridge in question, which of course could not be removed prior to the removal of the bridge, should be regarded as constituting a part of the bridge, and the Secretary of War may proceed, under section 18 of the act of March 3, 1899 (30 Stat. 1153), for the alteration of the bridge when, by reason of the widening of the channel up to that point, it has become an actual obstruction to the free navigation of the river. In such a contingency notice to remove the same should be given to both the railway company and the sanitary district. *Ib.*
4. **Same.**—The filling of a navigable waterway for the purpose simply of enabling riparian owners to reach the point of navigability by means of docks, piers, etc., when not forbidden by any statute of the United States or of a State, is neither unauthorized nor unlawful. *Ib.*

**CANAL AND LOCKS.** *See* WILLAMETTE FALLS, OREG.**CANTEENS.** *See* ARMS AND MUNITIONS OF WAR, 7.**CARBINE SCABBARDS.** *See* ARMS AND MUNITIONS OF WAR, 7.**CAREY ACT.**AGREEMENTS UNDER. *See* RECLAMATION OF ARID LANDS, 1, 2.**CAVALRY.** *See* ARMY, 5, 6.**CEBU, P. I.**BOND ISSUE. *See* PHILIPPINE ISLANDS, 4.**CENSUS BUREAU.**DISBURSING CLERK, TRANSFER OF DUTIES. *See* COMMERCE AND LABOR DEPARTMENT.**CENSUS OFFICE.**TRANSFER OF EMPLOYEES. *See* CIVIL SERVICE, 2.

**CERTIFICATE OF INSPECTION.** *See* VESSELS, 10.

**CHICAGO RIVER.** *See* BRIDGES, 1, 2, 3.

**CHICKASAW NATION.** *See* INDIANS, 1, 2.

**CHIPPEWA NATION.** *See* PUBLIC LANDS, 1.

**CHOCTAW NATION.** *See* INDIANS, 1, 2.

**CIGARETTES.** *See* PHILIPPINE ISLANDS, 2.

**CIGARS.** *See* PHILIPPINE ISLANDS, 1, 2.

**CIRCULATION OF NEWSPAPERS.** *See* NEWSPAPERS, 1, 2.

**CIVIL SERVICE.**

1. **District of Columbia.**—Under existing laws the classified service of the United States can not be extended to the officers and employees of the District of Columbia. 410.
2. **Employees transferred to the Census Office from other branches of the departmental classified service,** under section 7 of the census act of July 2, 1909 (36 Stat. 3), are eligible to appointment in any of the departments to positions of the same class or grade as those held by them at the date of their transfer to the Census Office, but not to higher positions. 313.

*See also* NAVY, 5, 6.

**CLEARANCE OF VESSELS.** *See* VESSELS, 1, 2.

**CLERKS.**

CLASS 3. *See* NAVY, 5, 6.

**COAL-MINING LEASES.** *See* COMMODITIES CLAUSE OF HEPBURN ACT, 1.

**COAST AND GEODETIC SURVEY.**

APPOINTMENT TO POSITIONS. *See* COMMERCE AND LABOR, SECRETARY OF, 4.

**COLLECTIONS.**

PURCHASE PRICE OF INTOXICATING LIQUORS. *See* NATIONAL BANKS, 1, 2, 3.

**COLLECTOR OF CUSTOMS.** *See* VESSELS, 1, 2.

**COLLIERS.**

CONSTRUCTION. *See* EIGHT-HOUR LAW, 3.

**COLON.** *See* OCEAN MAIL SERVICE, 3.

**COLON WHARF.** *See* PANAMA, 2.

**COMBINATIONS AND MONOPOLIES.**

1. **Construction of Colliers.**—The provision in the act of March 4, 1911 (36 Stat. 1288), under the head of "Construction and machinery," establishing an eight-hour workday, has reference to the construction of battleships and not colliers, and the fact that a contractor for one of the battleships may also contract for one or more colliers would not require the work on the colliers to be carried on on an eight-hour-a-day basis. 35.

**COMBINATIONS AND MONOPOLIES**—Continued.

2. **A contract for the purchase of oil and gasoline for the Government** may be awarded to the Standard Oil Co. of Indiana, notwithstanding that company was adjudicated a party to an unlawful trust and combination, since under the decision of the court the company can enter into a valid contract and may be required to execute a bond for the faithful carrying out of said contract. 156.
3. **Purchase of Structural Material.**—The provision of the naval appropriation act of March 4, 1911 (36 Stat. 1289), that no part of the money therein appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament, or machinery" from any combination or monopoly refers only to purchases made directly by the Navy Department. 44.
4. **Same.**—The provision of the naval appropriation act of March 4, 1911 (36 Stat. 1289), that no part of the money therein appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament, or machinery" from any combination or monopoly, imposes upon the Secretary of the Navy the duty of determining the fact of monopoly or conspiracy and, in ascertaining this fact, he is free to resort to all sources of information at his command. 14.
5. **Same—Presumption of Innocence.**—The presumption in the absence of any evidence to the contrary is here, as in all other cases, that the parties are innocent rather than guilty. The act does not, however, contemplate a previous judicial determination of combination or conspiracy before the prohibition of purchase applies. *Ib.*
6. **Same.—The Secretary may require, as a condition of receiving any bid, an affidavit from the person, or a responsible representative of the firm or corporation proposing to deal with the Government, to the effect that such person, firm, or company was not engaged in such a combination, and might also, by appropriate stipulations in the contract, provide for its annulment if it were ascertained that it had been obtained by false representations in that respect. *Ib.***
7. **Same.—The market price of any commodity under normal conditions is taken to be its reasonable value; and so in any case where purchase can be made in an open market under conditions of free competition it may be assumed that the prevailing price will not be "in excess of a reasonable profit above the actual cost of manufacture."** *Ib.*
8. **Reasonable Price.**—By the provision of the act of March 4, 1911 (36 Stat., 1289), that "no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture" Congress committed the determination of what are reasonable prices to the sound discretion and best judgment of the Secretary of the Navy, subject to the obligation to keep the cost of construction as much as possible within the bounds of the maximum prescribed. *Ib.*

**COMBINATIONS AND MONOPOLIES—Continued.**

9. **Purchase of Torpedoes From Combination or Monopoly.**—The purchase of Whitehead torpedoes, to be paid for from the appropriation "Torpedoes and appliances" in the naval appropriation act of March 4, 1911 (36 Stat. 1271), can not be made, by a provision in the same act, from a company that has combined or conspired to monopolize the interstate or foreign commerce of the United States, provided torpedoes and appliances are properly classified under the head of "armor, armament, or machinery," but this is a question of fact, rather than one of law, to be determined by the Secretary of the Navy. 35.

**COMMERCE AND LABOR, DEPARTMENT OF.**

The duties formerly performed by the disbursing clerk of the Bureau of the Census can not be transferred to the disbursing clerk of the Department of Commerce and Labor consistent with law within the meaning of section 161 of the Revised Statutes. 247.

**COMMERCE AND LABOR, SECRETARY OF.**

1. **Appointments.**—The Chief of the Division of Alaska Fisheries, in the Bureau of Fisheries, the character of whose duties is not unlike that of the chiefs of divisions generally in the several executive departments, should be appointed by the Secretary of Commerce and Labor. 116.
2. **Same.**—The naturalist, fur-seal fisheries, and the two physicians, Pribilof Islands, placed in the Division of Alaska Fisheries by the act of March 4, 1911 (36 Stat. 1439), should be appointed by the Secretary of Commerce and Labor, but as the Secretary has already made these appointments there is no necessity for their reappointment if the present incumbents are to be retained.
3. **Same.**—The position of local agent, Seattle, Wash., in the Bureau of Fisheries, the duties of which are strictly clerical, is within the meaning of section 169 of the Revised Statutes, and the appointment should be made by the Secretary of Commerce and Labor. 116.
4. **Same.**—The positions of engraver and electrotypist or photographer in the Bureau of Coast and Geodetic Survey, and the positions of associate physicist, assistant physicist, assistant chemist, laboratory assistant, aid, and superintendent of mechanical plant, in the Bureau of Standards, fall within the provisions of section 169 of the Revised Statutes and should be filled by appointments made by the Secretary of Commerce and Labor. 116.

**AUTHORITY TO ISSUE LICENSE.** See **RADIO COMMUNICATION.**

**AUTHORITY TO MAKE RULES, ETC.** See **FOOD AND DRUGS ACT, 1.**

**AUTHORITY TO REMIT PENALTIES.** See **PENALTIES, 1, 2.**

**COMMISSIONS.** See **ARMY, 5, 6.**

**COMMODITIES CLAUSE OF HEPBURN ACT.**

1. **Assignment of Coal-Mining Leases.**—The transfer of certain coal-mining leases, which embrace lands in the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in the Indian Territory, now Oklahoma, from the Western Coal & Mining Co. to the Folsom Morris Coal Mining Co., a corporation whose capital stock is owned by the Atchison, Topeka & Santa Fe Railway Co., is not forbidden by the commodities clause of the Hepburn Act (34 Stat. 585). 587.
2. **Coal Mining and Transportation.**—The railroad company has the right to mine and carry coal for use in its locomotives, since commodities necessary or intended for its use in the conduct of its business as a common carrier are expressly excepted from the operation of the statute. *Ib.*
3. **Shipment of Coal.**—The application of the commodities clause to the shipment of coal over the Atchison, Topeka & Santa Fe Railway Co. by the Folsom Morris Coal Mining Co. depends upon whether or not the railway company uses the coal company merely as an artificial legal entity which it completely dominates and controls; or whether, although the owner of all its stock, the coal company is operated separately and distinct from the railway company. 587.
4. **As the question under inquiry,** although purely hypothetical, deals rather with the establishment of a policy than the determination of a particular case, it is permissible for the Attorney General to call the attention of the Secretary of Commerce and Labor to the state of the law on the subject. *Ib.*

**CONFIDENTIAL PLANS, DISCLOSURE OF.** See **CONTRACTS**, 5.

**CONGRESS, INFORMATION FOR.** See **NATIONAL BANKS**, 4, 5.

**CONSTRUCTION OF STATUTES.**

1. **Departmental Construction.**—While contemporaneous and long-continued departmental construction of an ambiguous statute is entitled to very great weight, it is quite otherwise where the statute is clear and there is no need for the assistance derived from that source. 298.
2. **Manufacture and Importation of Smoking Opium.**—The act of February 9, 1909 (35 Stat. 614), prohibiting the importation of opium for other than medicinal purposes, did not repeal that portion of the act of October 1, 1890 (26 Stat. 620, 621), which relates to the manufacture of smoking opium in the United States. 108.
3. **Same.**—Neither the act of February 9, 1909, nor any other act has abrogated or dispensed with the necessity of observing each and all of the requirements of section 37 of the act of October 1, 1890, as to notices, inventories, bonds, books, returns, etc. *Ib.*

**CONSTRUCTION OF STATUTES—Continued.**

4. **Same.**—It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if by any permissible construction both may stand and be enforced there is no such repeal. *Ib.*
5. **The word “herein”** when employed in an act of Congress ordinarily and unless the context makes necessary a different construction means “in this act.” 35.

**CONTRABAND.** See ARMS AND MUNITIONS OF WAR.

**CONTRACTS.**

1. **Construction of Naval Vessels—Modification of Contracts.**—The Secretary of the Navy may insert in the contracts for vessels constructed under authority of the act of March 4, 1911 (36 Stat. 1265), a provision for making changes in said contracts and for determining the amount of increased or diminished compensation arising therefrom, whether such compensation be of the nature of liquidated or unliquidated damages. 285.
2. **A contract for the purchase of oil and gasoline** for the Government may be awarded to the Standard Oil Co. of Indiana, notwithstanding that company was adjudicated a party to an unlawful trust and combination since under the decision of the court the company can enter into a valid contract and may be required to execute a bond for the faithful carrying out of said contract. 156.
3. **Execution of Contract for Printed Facing Slips.**—An employee of the postal service who merely executes a contract with the United States, or a department thereof, on behalf of a corporation of which he is president, can not be said to be an agent for the corporation “in any business before the department” within the meaning of section 226 of the Criminal Code, and a contract thus executed may be legally entered into by the Postmaster General for what are known as “printed facing slips” to be used as labels on packages of letters. 199.
4. **Return of Government Contract.**—While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the Interior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. 293.

**CONTRACTS**—Continued.

5. **Same—Disclosure of Confidential Plans.**—In making the return of a contract on behalf of the Government, as provided for in sections 3744 and 3745 of the Revised Statutes, it is not required to accompany such contract with copies of plans that are confidential and can not be divulged without detriment to the public interests, and the affidavit may except such plans from the return. *Ib.*

**AMMUNITION.** See EIGHT-HOUR LAW, 1, 2, 19, 20.

**CARRIAGE OF MAILS.** See OCEAN MAIL SERVICE, 1, 2, 5.

**CONSTRUCTION OF COLLIERIES.** See EIGHT-HOUR LAW, 3.

**FOR DREDGING.** See EIGHT-HOUR LAW, 11, 12.

**FOR OVERTIME.** See EIGHT-HOUR LAW, 6.

**PARTIAL PAYMENTS UNDER GOVERNMENT CONTRACTS.** See ATTORNEY GENERAL, 6, 7.

**PURCHASE OF SUPPLIES.** See EIGHT-HOUR LAW, 9, 10.

**WORK CONTEMPLATED BY CONTRACT.** See EIGHT-HOUR LAW, 17, 18, 19.

**COPYRIGHT LAWS.**

1. **Date in President's Proclamation.**—Under section 8 of the copyright act of March 4, 1909 (35 Stat. 1077), the President is required to determine by proclamation the existence of the reciprocal conditions upon which alien authors and composers may acquire the general privileges under said act, and the date when the reciprocal condition was actually met by the laws of any foreign state or nation is the one which should be inserted in the proclamation. 209.
2. **Rights of Alien Authors and Composers.**—The provision at the end of section 8 of the copyright act of March 4, 1909 (35 Stat. 1077), which requires the President to determine by proclamation the existence of the reciprocal conditions upon which alien authors and composers may acquire the general privileges under said act, applies equally to the reciprocal condition specified in the proviso to section 1 (e) of that act, upon which an alien may acquire the right of controlling the parts of instruments serving to reproduce mechanically a musical work. 64.
3. **Same.**—Where a German citizen has complied with all the general provisions of the copyright act at any time subsequent to July 1, 1909, the date upon which the act became effective, there was vested in him the rights and privileges set forth in said act, except the right specified in section 1 (e), as Germany had at that time complied with one or more of the conditions enumerated in section 8, subsection (b). *Ib.*
4. **Same.**—A German citizen who has strictly complied with the provisions of the copyright act at any time between July 1, 1909, the date upon which the law became effective, and September 9, 1910, the date of the proclamation of the President declaring that the citizens of Germany were entitled to the general privileges

**COPYRIGHT LAWS**—Continued.

of that act, is not only vested with a copyright in his work or composition, but he may maintain an action for any infringement which occurred between said dates. *Ib.*

5. **Same.**—With reference to an infringement of the particular right specified in the proviso to section 1 (e) between September 9, 1910, and December 8, 1910, the same principle must apply; but as the proclamation of the President does not recite that this condition had been met prior to the date of the proclamation it would not afford evidence sufficient to sustain an action for infringement between said dates. *Ib.*
6. **Same.**—A German citizen could not acquire the right specified in the proviso to section 1 (e) of said act prior to September 9, 1910, the date upon which the reciprocal condition provided for therein was complied with by Germany. *Ib.*

**CORPORATION TAX.**

1. **Returns.**—Every corporation subject to the tax under the corporation-tax act of August 5, 1909 (36 Stat. 114), must make returns whether or not its net income is large enough to make it liable for any amount of that tax. 217.
2. **Same—Compromise of Penalties.**—For a mere failure to make such returns in time, in the case of corporations with incomes so limited as not to be liable to the payment of any tax, liberal compromise is a course required by the spirit and policy of the laws of the United States. *Ib.*
3. **Manila Railroad Co.**—The Manila Railroad Co., a corporation organized under the laws of New Jersey, and doing business wholly within the Philippine Islands, and operating under a concessionary contract granted by the Philippine Legislature, is liable to the Federal excise tax on corporations, imposed under section 38 of the act of Congress approved August 5, 1909 (36 Stat. 112). 164.
4. **Same—Not exempt from United States tax.**—The fact that the company is aided in its business by the Philippine Government can not of itself exempt it from the burdens of taxation imposed by the Government of the United States. *Ib.*

**CORPORATIONS.**

STATUS OF FOREIGN AND DOMESTIC. *See* PHILIPPINE ISLANDS, 8, 9, 10.

FOR TRANS-ATLANTIC RADIO-COMMUNICATION. *See* RADIO-COMMUNICATION.

**COURT-MARTIAL.** *See* NAVY, 1, 2, 3, 4.

**CRIMINAL CODE.**

SECTION 87, 89. *See* NAVY, 1, 2, 3.

SECTION 184. *See* ERIE RAILROAD CO.

SECTION 226. *See* CONTRACTS, 3.

SECTION 329. *See* NATIONAL BANKS, 1.



**CRISTOBAL.** *See* OCEAN MAIL SERVICE, 4.

**CUSTOMS, COLLECTOR OF.** *See* VESSELS, 1, 2.

**DEPOSIT ACCOUNTS.** *See* POSTAL SAVINGS SYSTEM, 6, 7.

**DEPOSITORIES FOR POSTAL SAVINGS FUNDS.** *See* POSTAL SAVINGS SYSTEM, 1, 2, 3, 4, 5, 6, 7.

**DEPUTY CLERKS OF DISTRICT COURTS.** *See* OFFICIAL BONDS, 3.

**DEPUTY PUBLIC PRINTER.** *See* GOVERNMENT PRINTING OFFICE, 3.

**DISBURSING CLERK, CENSUS BUREAU.** *See* COMMERCE AND LABOR, DEPARTMENT OF.

**DISTRICT COURT OF UNITED STATES, P. R.** *See* PORTO RICO, 14.

**DISTRICT OF COLUMBIA.**

1. **Civil Service.**—Under existing laws the classified service of the United States can not be extended to the officers and employees of the District of Columbia. 410.
2. **Correction of Records of War Department Relating to Land Titles.**—The authority of the Secretary of War to make correction of the records of the War Department in respect of certain lots in the District of Columbia, provided for by section 2 of the act of March 3, 1899 (30 Stat. 1346), was not suspended by section 26 of the act of May 30, 1908 (35 Stat. 544), creating a commission "for the purpose of investigating the title of the United States in and to all lands in the District of Columbia." 40.
3. **Same.**—Section 26 of the act of May 30, 1908 (35 Stat. 544), is entirely consistent with section 2 of the act of March 3, 1899 (30 Stat. 1346), and the latter provision is not repealed by the former. *Ib.*
4. **Validity of Certificate of Purchase—Isaac Pollock.**—A certificate of purchase of certain lots in the city of Washington, which was executed July 22, 1797, by the commissioners in favor of Isaac Pollock but was not recorded until May 30, 1804, did not vest the legal title in the purchaser for the reason that the law then in force required it to be recorded within six months from the date thereof in order to have legal effect. 1.
5. **Same—Quitclaim Deed.**—While the certificate in question did not convey the legal estate, yet it passed an equitable interest in the land, and, being equivalent to a contract of sale by the commissioners, the execution of a quitclaim deed to the claimants by the Chief Engineer of the Army is not prohibited by the act of May 30, 1908 (35 Stat. 544), but such deed executed by him will be valid. *Ib.*

**DIVIDENDS ON DEPOSITS.** *See* POSTAL SAVINGS SYSTEM, 1.

**DOMINICAN REPUBLIC.**

EXPORT OF ARMS TO. *See* ARMS AND MUNITIONS OF WAR, 6.

**DREDGING CONTRACTS.** *See* EIGHT-HOUR LAW, 11, 12.

**EGGS, FROZEN.** *See* SEIZURES.

**EIGHT-HOUR LAW.**

1. **Ammunition.**—The requirement of law that a contractor for ammunition shall have established an eight-hour workday for all of his employees engaged upon the work under contract is to be construed as prohibiting his working such employees more than eight hours a day. 488.
2. **Same.**—The eight-hour workday restriction of this proviso does not apply to purchases of ammunition made abroad. 488.
3. **Construction of Colliers.**—The provision in the act of March 4, 1911 (36 Stat. 1288), under the head of "Construction and machinery," establishing an eight-hour workday, has reference to the construction of battleships and not colliers, and the fact that a contractor for one of the battleships may also contract for one or more colliers would not require the work on the colliers to be carried on on an eight-hour-a-day basis. 35.
4. **Construction of Naval Vessels.**—The provisions in the naval appropriation act of March 4, 1911 (36 Stat. 1288), relating to an eight-hour workday for employees engaged in the construction of the vessels therein authorized, are not limited to the employees of contractors but apply to employees of subcontractors engaged in the actual construction of said vessels. 279.
5. **Same.**—Under the eight-hour restrictions of said act, the person, firm, or corporation actually constructing any of the vessels therein specified must establish an eight-hour workday for all of its employees engaged in making any of the parts of the vessels and in assembling those parts upon their completion. *Ib.*
6. **Same.**—These eight-hour restrictions prohibit the working of employees more than eight hours a day in the construction of said vessels and their machinery, and they can not be nullified by permitting the employees by contract with their employers to work overtime for additional compensation. *Ib.*
7. **Same.**—The provision in the naval appropriation act of March 4, 1911 (36 Stat. 1287), requiring the person, firm, or corporation constructing any of the vessels therein specified to establish an eight-hour workday for all of its employees, does not authorize the establishment of a schedule by which the employees work more than eight hours in any one day. 371.
8. **Same.**—A schedule by which employees work  $8\frac{1}{2}$  or  $8\frac{3}{4}$  hours on five days in the week and 4 or 5 hours on Saturday, making a total of 48 hours in each week, is prohibited by the eight-hour workday restriction in said act of 1911. *Ib.*
9. **Contracts for the Purchase of Supplies by the Government.**—The eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies to contracts for the purchase of supplies by the Government where the work incident to the manufacture thereof has ordinarily been performed by the Government up to the time of the making of the contract therefor and not merely occasionally or to a limited extent, and it is immaterial whether the contractor furnishes both materials and labor or labor only. 505.

**EIGHT-HOUR LAW—Continued.**

10. **Same.**—The said act of June 19, 1912, becomes effective January 1, 1913, and hence only contracts thereafter made are required to contain the eight-hour restriction and the penalty stipulation provided for therein. *Ib.*
11. **Dredging Contracts.**—Under the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), it will not be necessary to report the cases of any persons working more than eight hours a day upon any vessel engaged in dredging under a Government contract, irrespective of whether such persons are connected with the vessel as a part of its crew in its operation and management or are only employed thereon in the particular work of dredging and handling material. 583.
12. **Same.**—**Status of Employee.**—Where the administrative officer in charge is in doubt as to whether a dredging contract involves the employment of laborers or mechanics, the wisest course is to insert in the contract the eight-hour restriction required by the act of June 19, 1912, leaving the status of any particular person as to whom the question is raised to be determined by the actual facts of his employment. *Ib.*
13. **Laborers at Customs Ports.**—The act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, includes in its scope such of the laborers employed at the various customs ports as are actually engaged in manual labor, and as to these laborers the act of March 15, 1898 (30 Stat. 316), has not repealed the provisions of the said eight-hour law. 481.
14. **Same.**—**The extension-of-hours act of March 15, 1898** (30 Stat. 316), applies only to employees in the departments at the seat of government. *Ib.*
15. **Repairs to Government Vessels.**—The employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the eight-hour law of August 1, 1892 (27 Stat. 310). 395.
16. **Status of Claims for Labor and Material.**—The Attorney General declines to express an opinion as to what, if any, steps must be taken under the proviso by the contracting officer, and what is the status of claims presented for payment for labor and material furnished under a contract, in the event that a contractor who had actually announced an eight-hour workday before obtaining his contract should afterwards for any reason revert to a longer workday, as the question is hypothetical. 488.
17. **Work Contemplated by the Contract.**—The eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract. The words "work contemplated by the contract" include the work directly and proximately in view in the contract as specifically appropriated to and destined for the Government use. 534.

**EIGHT-HOUR LAW—Continued.**

18. **Same.**—The word “supplies” and the phrase “such materials or articles as may usually be bought in open market” are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration. *Ib.*
19. **Same.**—**Projectiles.**—Contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction, but only the work done in assembling the parts, treating the forging or casting, and machining the projectiles would be “work contemplated by the contract” unless the casting and other parts were manufactured solely and exclusively for the purpose of making the projectiles. 534.
20. **Same.**—**Smokeless powder** is manufactured ordinarily by the Government, and hence contracts for the purchase thereof are subject to the eight-hour restriction. 534.

**EMANCIPATION PROCLAMATION.**

1. **Fiftieth Anniversary of the Emancipation Proclamation.**—It is within the power of the President to issue a general proclamation calling the attention of the people of the country to the fiftieth anniversary of the issuance of the emancipation proclamation and inviting them to unite in an appropriate celebration of that event. 52.
2. **Same.**—If, however, it is desired that especial national observance be paid to the anniversary of the issuance of the emancipation proclamation by making it a legal holiday and providing for appropriate services under national auspices, the matter should be brought to the attention of Congress, to the end that the appropriate enactment be had by the passage of a bill or joint resolution. *Ib.*

**EMBEZZLEMENT.** *See* NAVY, 1, 2, 3, 4.

**EMPLOYEES OF CONTRACTORS.** *See* EIGHT-HOUR LAW, 7, 8, 9, 10.

**EMPLOYEES OF UNITED STATES.** *See* CIVIL SERVICE.

**EMPLOYER'S LIABILITY.** *See* SEAMEN.

**EQUIPMENT OF VESSELS.** *See* VESSELS, 6, 7.

**ERIE RAILROAD CO.**

**Transportation of Letters Outside the Mail.**—The Erie Railroad Co. has the right under section 184 of the Penal Code (35 Stat. 1124) to transport over its lines, otherwise than in the mail, letters written by the secretary of the Erie Employees' Relief Association, an organization composed of officers and employees of that railroad, to the railroad company, but can not transport letters written by the officers of said relief association to its members. 418.

**FISHERIES BUREAU, SEATTLE, WASH.**

LOCAL AGENT, APPOINTMENT. *See* COMMERCE AND LABOR, SECRETARY OF, 3.

**FISHERIES, DEPUTY COMMISSIONER.**

APPOINTMENT. *See* PRESIDENT, 2.

**FOLSOM MORRIS COAL MINING CO.** *See* COMMODITIES CLAUSE OF HEPBURN ACT, 1, 3.

**FOOD AND DRUGS ACT.**

1. Authority to Make Rules and Regulations and Review Findings of Fact.—The Secretaries of the Treasury, Agriculture, and Commerce and Labor are restricted to the making of rules and regulations for carrying out the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768), and have no authority to review findings of fact and reports made to the Secretary of Agriculture. 494.
2. Same.—The findings of the Referee Board of the Department of Agriculture are not conclusive on the courts or the Secretary of Agriculture, but are simply for the information of the latter. *Ib.*
3. Same.—The approval of the Secretary of Agriculture of a finding of the Referee Board is notice to the public that in subsequent examinations of food samples such finding will be followed. *Ib.*

**FOREIGN CORPORATIONS.** *See* PHILIPPINE ISLANDS, 8, 9, 10.

**FOREIGN MAILS.** *See* OCEAN MAIL SERVICE, 3, 4.

**FOREIGN PORTS.** *See* OCEAN MAIL SERVICE, 3, 4, 5; PANAMA, 2; VESSELS, 11.

**FOREIGN TUGBOAT.** *See* VESSELS, 3.

**FOREIGN VESSELS.** *See* VESSELS, 11.

**FOREST RESERVES.**

The authority to grant easements for rights of way for electrical, telephone and telegraph purposes, as contemplated by the agricultural appropriation act of March 4, 1911 (36 Stat. 1253), is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the national forests. 303.

**FORFEITURE.** *See* OPIUM, 1; PENALTIES, 3.

**FREIGHT RATES.** *See* PANAMA, 1.

**FROZEN EGGS.** *See* SEIZURES.

**GOOD ROADS BONDS.**

WILSON TOWNSHIP, N. C. *See* POSTAL SAVINGS SYSTEM, 19, 20.

**GOODS IMPORTED FOR ARMY.** *See* PHILIPPINE ISLANDS, 3.

**GOVERNMENT PRINTING OFFICE.**

1. Public Printer—Acceptance of Estimates for Supplies.—Estimates furnished by the Public Printer, as provided for by section 2 of the act of March 3, 1883 (22 Stat. 527), for supplying the money-order service with forms and blank books, may be accepted which are submitted subsequent to the final date for the receipt of proposals from private bidders. 329.

**GOVERNMENT PRINTING OFFICE**—Continued.

2. **Same.**—There is a clear distinction between proposals made by private bidders and estimates submitted by the Public Printer, and there is no statutory requirement that the latter shall be submitted before or at the time the former are made. *Ib.*
3. **Status of Deputy Public Printer and Chief Clerk.**—The Deputy Public Printer of the Government Printing Office is the proper person to perform the duties and exercise the powers prescribed by sections 20 and 36 of the act of January 12, 1895 (28 Stat. 603, 606), and the chief clerk is confined to those duties and powers which ordinarily belong to that office, as such. 210.

**GUN GREASE.** *See* ARMS AND MUNITIONS OF WAR, 9.

**HUDSON RIVER.**

**Construction of New Lock and Dam at Troy, N. Y.**—The appropriation in the river and harbor act of June 25, 1910 (36 Stat. 635), for improving the Hudson River, which contemplated the construction of a new lock and dam in the vicinity of Troy and the removal of the State dam, was conditioned upon the extinguishment by the State of all existing power rights or privileges affected by the improvement, and after the existing power rights and privileges in question had been extinguished by the State canal board it was beyond the power of the State to interfere with the improvement authorized, in view of the paramount control of Congress over the Hudson River as a navigable waterway of the United States. 173.

**IMPORTATION.** *See* OPIUM; VIRUSES.

**IMPORTED MEATS.** *See* MEAT INSPECTION, 2, 4.

**IMPROVEMENT BONDS.**

- CEBU, P. I. *See* PHILIPPINE ISLANDS, 4.  
 PORTLAND, OREG. *See* POSTAL SAVINGS SYSTEM, 10.  
 TUSCALOOSA, ALA. *See* POSTAL SAVINGS SYSTEM, 8.  
 WEST END, ALA. *See* POSTAL SAVINGS SYSTEM, 9.

**INCOME TAX.** *See* CORPORATION TAX.

**INDEMNITY LANDS.** *See* RAILROAD LAND GRANTS, 1, 2, 3, 4, 5, 6.

**INDIAN COUNTRY.** *See* ATTORNEY-GENERAL, 5.

**INDIAN LANDS, OKLAHOMA.** *See* COMMODITIES CLAUSE OF HEPBURN ACT, 1.

**INDIAN SCHOOLS.** *See* ATTORNEY-GENERAL, 5.

**INDIANA.**

- POSTAL SAVINGS FUND STATUTE. *See* POSTAL SAVINGS SYSTEM, 1.  
 PRIVATE BANKS. *See* POSTAL SAVINGS SYSTEM, 15.

**INDIANS.**

1. **Appointment of Mining Trustee.**—Upon the expiration of the term for which a mining trustee for the Choctaw Nation was appointed, it is entirely competent that a new appointment be made. 231.

**INDIANS—Continued.**

2. **Indian Allotment Lands—Alienation.**—Lands allotted to the Choctaw and Chickasaw Indians under the act of July 1, 1902 (32 Stat. 641), could not be conveyed prior to the act of April 26, 1906 (34 Stat. 137), by the full-blood heirs of said allottees within the period of inhibition named in the former act; and such attempted conveyances could not be validated by the approval of the Secretary of the Interior under the provisions of section 22 of the latter act, as that section is not retroactive. 131.

3. **Sales of timber from unallotted lands of the White Mountain Apache Indian Reservation**, which were included in the Sitgreaves National Forest by the President's proclamation of March 2, 1909 (35 Stat. 2236), should be conducted by the Secretary of the Interior and the purchase money should be placed to the credit of the Indians. 239.

*See also* PUBLIC LANDS, 1

**INSPECTION.** *See* MEAT INSPECTION; MOTOR BOATS.

**INSPECTION CERTIFICATE.** *See* VESSELS, 10.

**INSPECTOR GENERAL'S DEPARTMENT.**

RETIREMENT OF EXPERT ACCOUNTANT. *See* ARMY, 1.

**INTERIOR, DEPARTMENT OF.**

1. **Designation of Special Disbursing Agent by Chief Clerk.**—Where, during the temporary absence of the Secretary and the Assistant Secretaries, the chief clerk of the Department of the Interior, by authority of the Secretary, signed a communication as "chief clerk and chief executive officer," designating a special disbursing agent, the designation thus made is valid by virtue of authority granted by the act of March 4, 1911 (36 Stat. 1213). 273.

2. **Same**—The bond required in this case should show on its face that the designation was made under the act of March 4, 1911, by the chief clerk and executive officer by authority of the Secretary of the Interior in the temporary absence of the Secretary and his assistants. *Ib.*

**INTERNAL REVENUE TAX.** *See* PHILIPPINE ISLANDS, 1, 2.

**INTERSTATE COMMERCE ACT.** *See* COMMODITIES CLAUSE OF HEPBURN ACT.

**INTOXICATING LIQUORS.**

COLLECTION FOR. *See* NATIONAL BANKS, 1, 2, 3.

INTRODUCTION ON INDIAN SCHOOL LANDS. *See* ATTORNEY-GENERAL, 5.

**LABORERS.** *See* EIGHT-HOUR LAW, 12, 13, 14, 15.

**LAND GRANTS.** *See* RAILROAD LAND GRANTS.

**LARD SUBSTITUTE.** *See* MEAT INSPECTION, 1.

**LEGAL HOLIDAY.** *See* EMANCIPATION PROCLAMATION.

**LIBRARY OF CONGRESS.**

1. **Assistant in Division for the Blind.**—The provision in the legislative, executive, and judicial appropriation act of August 23, 1912, for an assistant in the division for the blind in the Library of Congress, creates a particular position but does not designate the particular person who is to fill it; the phrase "formerly in free Public Library" is merely descriptive of the character of the duties of the position created. 532.
2. **Transfer of Lighting and Heating Plant.**—The Superintendent of the Library Building and Grounds has no authority to transfer certain disused portions of the lighting and heating plant of the Library of Congress to the Bureau of Mines of the Department of the Interior. 524.

**LIFE-SAVING MEDALS.** See PHILIPPINE ISLANDS, 5

**LIFE-SAVING STATION.** See ARANSAS LIFE-SAVING STATION.

**LOCKS AND DAMS.** See HUDSON RIVER; WILLAMETTE FALLS, OREG.

**LOGS.**

DELIVERY. See VESSELS, 3.

**LOWRY NATIONAL BANK, ATLANTA, GA.** See NATIONAL BANKS, 6, 7.

**MAGAZINES.** See NEWSPAPERS, 3.

**MAILS.** See ERIE RAILROAD COMPANY; OCEAN MAIL SERVICE; PHILIPPINE ISLANDS, 6, 7.

**MANILA RAILROAD CO.** See CORPORATION TAX, 3, 4.

**MARINE CORPS.**

1. **The employment of any officer in the Navy or Marine Corps on the active or retired list** by any person or company furnishing naval supplies or war material to the Government is prohibited by a provision in the naval appropriation act of June 10, 1896 (29 Stat. 361). 45.
2. **Relative Rank.**—Officers of the Marine Corps and of the Navy.—The Secretary of the Navy is without authority to make such a change in article 23 of the Navy Regulations, 1909, as to fix the relative rank of officers of the Marine Corps with officers of the Navy according to the length of service rather than by the date of commission. 264.
3. **Same.**—Paragraph 3 of article 25 of the Navy Regulations, 1909, may be amended in form so as to read: "When officers of the Army are associated jointly with officers of the Navy or Marine Corps their corresponding rank shall be determined according to the dates of their respective commissions, when of the same or of corresponding grades; and when of different rank, as set forth in the first paragraph of this article." *Ib.*
4. **Retired Officers of the Army and Marine Corps are Officers in the Employ of the Government.**—An officer of the United States Army or Marine Corps retired from active service only, and not wholly retired from service, is an officer in the employ of the Government, and so within the prohibition of section 1782 of the Revised Statutes. 397.



**MEAT INSPECTION.**

1. **Lard Substitute—Interstate Transportation.**—Lard substitute, composed of imported oleo stearin and vegetable oil, is subject to the inspection authorized under the meat-inspection provisions of the act of June 30, 1906 (34 Stat. 674), and the interstate transportation thereof is prohibited unless the provisions of said act are complied with. 227.
2. **Same—Inspection of Establishments.**—The provisions of the above-mentioned act in relation to the inspection of "establishments" cover all "establishments" where meat-food products are prepared, wherever the meat which goes into them may have come from. *Ib.*
3. **Post-Mortem Examination—Mark of Inspection.**—Under the meat-inspection amendment of June 30, 1906 (34 Stat. 674), the Federal mark of inspection can not be lawfully placed upon any meat-food product unless the animal from which it was derived received a post-mortem examination by the inspectors of the Bureau of Animal Industry. 355.
4. **Same.—Imported meats and meat-food products** are entitled to admission into this country and to interstate commerce subject only to the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768), even though they should be further manufactured in this country, provided they are not mixed with domestic meat and meat products, but they can in no instance bear the Federal mark of approval provided for by the meat-inspection act of 1906. *Ib.*

**MECHANICS.** See EIGHT-HOUR LAW, 12, 15.

**MEDALS.** See PHILIPPINE ISLANDS, 5.

**MEXICO.**

EXPORT OF ARMS TO. See ARMS AND MUNITIONS OF WAR, 7, 8, 9.

**MILITIA.**

**Authority of President to Send Militia Into a Foreign Country.**—

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation. 322.

**MINERAL INDEMNITY LANDS.** See RAILROAD LAND GRANTS, 1, 2, 3, 4, 5, 6.

**MINES, BUREAU OF.**

HEATING AND LIGHTING PLANT. See LIBRARY OF CONGRESS, 2.

**MINING TRUSTEE.**

FOR CHOCTAW NATION. See INDIANS, 1.

**MINNESOTA.**

RECLAIMED LANDS, MUD LAKE. See PUBLIC LANDS, 1, 2, 3, 4, 5.

**MONEY-ORDER SERVICE.** See PHILIPPINE ISLANDS, 6, 7.

**MOTOR BOATS.**

**Inspection of steam motor boats.**—The engine, boiler, or other operating machinery of a steam motor boat more than 40 feet in length is subject to inspection by the local inspectors of steam vessels, and the design thereof is subject to their approval, by the proviso to section 1 of the act of June 9, 1910 (36 Stat. 462), which act repealed by implication so much of section 4426 of the Revised Statutes as requires inspection of small steam vessels of the motor-boat class, but it did not repeal prior laws relating to the inspection of motor boats propelled otherwise than by steam. 112.

**MUD LAKE, MINN.**

**RECLAIMED LANDS.** See PUBLIC LANDS, 1, 2, 3, 4, 5.

**NATIONAL BANKS.**

1. **Collecting Purchase Price of Intoxicating Liquors Shipped from One State Into Another.**—Section 239 of the Criminal Code, which prohibits the collection of the purchase price of intoxicating liquors by a person acting in connection with the transportation thereof from one State into another, does not apply to banks, collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. 58.
2. **Same.**—Where consignments of liquor are made to fictitious persons and the bills of lading, with drafts attached, are sent to a bank with such instructions that the goods are delivered to anybody who will pay the draft and accept the goods, even though the person to whom the goods are delivered has not previously ordered the liquor, such a transaction would constitute a sale by the bank and the bank in such a case would be amenable to discipline by the State for selling liquor contrary to the State law, and also to discipline by the Federal authorities for selling liquor without compliance with the provisions of the internal-revenue laws. 59.
3. **Same.**—Such a business, moreover, is clearly beyond the powers of a national bank, and if the Secretary of the Treasury is satisfied that there is any considerable amount of dealing of that character by banks, he might well issue a general warning to them against engaging in such *ultra vires* transactions. *Ib.*
4. **Information Relating to National Banks for Congress.**—The President may give to a committee of Congress information in the possession of the Comptroller of the Currency relative to the operation of national banks, if, in his opinion, it is proper to do so, but if, in his opinion, the interests of the Government require that this information shall be treated as confidential, he has the right to refuse to divulge it. 555.

**NATIONAL BANKS**—Continued.

5. **Same.**—If the President believes that this information should be obtained and considered by the comptroller in the performance of his duties, he may direct him to procure it; and after it has been obtained for this legitimate purpose, he may, if he deems it proper, direct the comptroller to furnish it to the committee of Congress. If, however, neither the President nor the comptroller believes that such information is useful or necessary to the comptroller in the performance of his duties, the President could not properly direct him to procure it. *Ib.*
6. **Lowry National Bank of Atlanta, Ga.**—**Establishment of Branch Office.**—A national bank, independently of section 5190, Revised Statutes, is not under its charter authorized to establish a branch bank or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization. 81.
7. **Same.**—**Section 5190, Revised Statutes,** properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization. *Ib.*

**NATIONAL FORESTS.** *See* FOREST RESERVES.**NATIONAL GUARD.** *See* ARMY, 2.**NATURALIZATION.** *See* ATTORNEY GENERAL, 3, 4; PORTO RICO, 8.**NAVAL OFFICERS.** *See* NAVY, 5, 7, 8, 9.**NAVAL STATIONS.**

TRANSFER OF. *See* PORTO RICO, 9, 10, 11, 12, 13.

**NAVIGATION.**

**Obstructions.**—Filled-in land is subject to the servitude of navigation, and any obstruction to navigation arising therefrom could be abated by Congress, even if made under the authority of the State. 139.

**Same.**—The filling of a navigable waterway for the purpose simply of enabling riparian owners to reach the point of navigability by means of docks, piers, etc., when not forbidden by any statute of the United States or of a State, is neither unauthorized nor unlawful. 139.

**NAVY.**

1. **Court-Martial — Embezzlement — Assistant Paymaster in the Navy.**—The willful use of Government funds by a pay officer of the Navy for the purpose of cashing a certificate of deposit as an accommodation to a personal friend, constitutes embezzlement under the provisions of sections 87 and 89 of the Criminal Code. 563.
2. **Same.**—The overpayment by a pay officer of the Navy to himself from public funds, where the officer is guilty of such negligence or indifference as to indicate a willful disregard of the duties

**NAVY—Continued.**

- imposed upon him by law with respect to the safe-keeping of the moneys in his charge, is in violation of sections 87 and 89 of the Criminal Code. *Ib.*
3. **Same.—The willful withdrawing of public funds by a pay officer of the Navy for his personal use while absent from his station of duty, even though there be no intention on his part to defraud the United States and the funds withdrawn are subsequently replaced, is a violation of the provisions of sections 87 and 89 of the Criminal Code. *Ib.***
  4. **Same.—View expressed that charge of embezzlement should be formulated under paragraph 9, article 14, of the Articles for the government of the Navy, but as a matter of precaution advised that such charge be formulated under both said paragraph and article 22, or "catch-all" clause of said articles. *Ib.***
  5. **Retired Naval Officers—Eligibility of, for Appointment in the Classified Service.**—A retired officer of the Navy whose retired pay amounts to \$2,500 per annum is within the prohibition of section 2 of the act of July 31, 1894 (28 Stat. 205), and is ineligible to hold office as clerk of class 3 under the United States Civil Service Commission. 503.
  6. **Same.—The position of a clerk of class 3 under the United States Civil Service Commission, the appointment thereto being authorized by the President, is an office within the meaning of section 2 of the act of July 31, 1894. *Ib.***
  7. **The employment of any officer in the Navy or Marine Corps on the active or retired list by any person or company furnishing naval supplies or war material to the Government is prohibited by a provision in the naval appropriation act of June 10, 1896 (29 Stat. 361). 45.**
  8. **Naval Officers and Officers of Marine Corps—Relative Rank.**—The Secretary of the Navy is without authority to make such a change in article 23 of the Navy Regulations, 1909, as to fix the relative rank of officers of the Marine Corps with officers of the Navy according to the length of service rather than by the date of commission. 264.
  9. **Same.—Paragraph 3 of article 25 of the Navy Regulations, 1909, may be amended in form so as to read: "When officers of the Army are associated jointly with officers of the Navy or Marine Corps their corresponding rank shall be determined according to the dates of their respective commissions, when of the same or of corresponding grades; and when of different rank, as set forth in the first paragraph of this article." *Ib.***

**NAVY, DEPARTMENT OF.**

**PURCHASE OF STRUCTURAL MATERIAL.** See COMBINATIONS AND MONOPOLIES, 3, 4, 5, 6.

**NAVY, SECRETARY OF.**

CONTRACTS FOR VESSELS. *See* CONTRACTS, 1.

PURCHASE OF STRUCTURAL MATERIAL. *See* COMBINATIONS AND MONOPOLIES, 4, 5, 6, 7, 9.

RETURN OF GOVERNMENT CONTRACTS. *See* CONTRACTS, 5, 6.

TRANSFER OF NAVAL STATIONS. *See* PORTO RICO, 9, 10, 11, 12, 13.

**NEWSPAPERS, ETC.**

1. **Filing Statement of Paid Circulation.**—The statement of daily newspapers required to be filed by section 2 of the Post Office appropriation act of August 24, 1912, should include the average of the number of copies of each issue of such publications sold or distributed to all persons who have subscribed—that is, have agreed to take and pay for one or more copies of the publications for a definite period of time—and have paid for such subscriptions, and it is immaterial whether or not the subscriptions are individual or in bulk. 526.
2. **Same.**—The provision covers the number of copies of such publications distributed to such subscribers by any means, whether by the mails or otherwise. *Ib.*
3. **Filing Statement of Ownership.**—Section 2 of the Post Office appropriation act of August 24, 1912, requiring newspapers, magazines, periodicals, and other publications to file statement of ownership, etc., applies only to such publications as are regularly entered as second-class mail matter. 550.

**NORTHERN PACIFIC RAILWAY CO.** *See* RAILROAD LAND GRANTS, 3, 4, 5, 6.

**NOTICE.** *See* FOOD AND DRUGS ACT, 3.

**OCEAN MAIL SERVICE.**

1. **Advertisements—Contracts.**—In contracting for the carriage of the mails between ports of the United States and ports on the Isthmus of Panama, pursuant to the act of March 3, 1891 (26 Stat. 830), the Postmaster General is required to advertise for separate proposals and to make a separate contract for each separate and distinct line of service. 389.
2. **Same.**—The word "route," as used in section 1 of the above-mentioned act, means the course or way to be traveled in going from one place to another. *Ib.*
3. **Foreign Ports.**—The cities of Panama and Colon and the harbors adjacent to said cities being reserved as a part of the Republic of Panama in the grant of the Canal Zone to the United States, the ports of Panama and Colon are foreign ports within the meaning of the act of March 3, 1891 (26 Stat. 830), providing for ocean mail service between the United States and foreign ports. 194.
4. **Same.**—Vessels using the Government docks at Cristobal and Balboa, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, would be carrying mails between the United States and foreign ports within the spirit and letter of said act of March 3, 1891. *Ib.*

**OCEAN MAIL SERVICE**—Continued.

5. **Same.**—In entering into contracts for carrying foreign mails under the act of March 3, 1891 (26 Stat. 830), the Postmaster General, in the promotion of the commercial interests of the United States, has authority to reject any bid not in his opinion reasonable for attaining such purpose and may notify prospective bidders in advance of his purpose not to entertain such bids, and may reserve the right to rescind the contract if a material condition thereof be disregarded by the contractors. *Ib.*

**OFFICIAL BONDS.**

1. **Form of Bond of Assistant Treasurer of United States.**—A bond voluntarily given by an assistant treasurer of the United States for the faithful discharge of the duties of his office, under section 3600, Revised Statutes, may be worded so as to operate retroactively.
2. **Same—Retroactive Feature.**—Whether the new bond is retroactive or not, a full account of the money on hand should be made in order to fix the liability of the respective bonds in the event of defalcation. 28.
3. **Premium on Official Bonds.**—Deputy clerks of the district courts of the United States are "officers of the United States" within the meaning of the provision of the urgent deficiency appropriation act of August 5, 1909 (36 Stat. 118, 125), which limits the rate of premium on official bonds of officers and employees of the United States. 593.

**OFFICERS.** See ARMY, 2, 3, 4, 5, 6, 7; MARINE CORPS, 1, 2, 3, 4; NAVY, 5, 7, 8, 9.

**OFFICERS OF THE UNITED STATES.** See OFFICIAL BONDS, 3.

**OKLAHOMA.**

PUBLIC BUILDING BONDS. See POSTAL SAVINGS SYSTEM, 16.

**OPIUM.**

1. **Importation of Opium—Forfeiture.**—Section 2 of the act of February 9, 1909 (35 Stat. 614), authorizes the summary destruction, without judicial proceedings, of opium imported into the United States in violation of section 1 of said act. 603.
2. **Manufacture and Importation of Smoking Opium.**—The act of February 9, 1909 (35 Stat. 614), prohibiting the importation of opium for other than medicinal purposes, did not repeal that portion of the act of October 1, 1890 (26 Stat. 620, 621), which relates to the manufacture of smoking opium in the United States. 108.
3. **Same.**—Neither the act of February 9, 1909, nor any other act has abrogated or dispensed with the necessity of observing each and all of the requirements of section 37 of the act of October 1, 1890, as to notices, inventories, bonds, books, returns, etc. *Ib.*

**OPIMUM**—Continued.

4. **Same.**—It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if by any permissible construction both may stand and be enforced there is no such repeal. *Ib.*

NOT INCLUDED IN MANIFEST. *See* VESSELS, 1, 2.

**OWNERSHIP OF NEWSPAPERS, ETC.** *See* NEWSPAPERS, 3.**PANAMA.**

1. **Panama Railroad**—Articles manufactured in Panama should be transported by the Panama Railroad Co. at the reduced freight rates provided for in article 20 of the agreement between the Republic of Colombia, now Panama, and the Panama Railroad Co., irrespective of whether the raw material from which they are made is of home or foreign production. 23.
2. **Sovereignty Over the Colon Wharf.**—A vessel loading at the Colon wharf of the Panama Railroad Co. and subsequently entering a port of the United States should be regarded as coming from a "foreign port or place" within the meaning of section 36 of the tariff act of August 5, 1909 (36 Stat. 111), and the Republic of Panama, for the purposes under consideration, should be treated as sovereign over such wharf. 269.

COLON, FOREIGN PORT. *See* OCEAN MAIL SERVICE, 3.

CRISTOBAL, FOREIGN PORT. *See* OCEAN MAIL SERVICE, 4.

PANAMA (CITY), FOREIGN PORT. *See* OCEAN MAIL SERVICE, 3, 4.

**PAPER CAPS.** *See* ARMS AND MUNITIONS OF WAR, 8.**PARCEL POST.** *See* PHILIPPINE ISLANDS, 6, 7.**PARTIAL PAYMENTS.** *See* ATTORNEY GENERAL, 6, 7.**PASSENGERS.** *See* VESSELS, 10, 11.**PATENTS FOR SHORE LOTS.** *See* PUBLIC LANDS, 2.**PAYMASTER, ASSISTANT.** *See* NAVY, 1, 2, 3.**PENAL CODE.** *See references under* CRIMINAL CODE.**PENALTIES.**

1. **Remission of Penalty After Entry of Final Judgment.**—The Secretary of Commerce and Labor has authority, under section 5294, Revised Statutes, to remit or mitigate a penalty after entry of final judgment incurred for violating a provision of law relating to vessels and seamen and discontinue the prosecution. 149.
2. **Same.**—The costs which are not, as a general rule, charged against the defendant when proceedings are discontinued by the plaintiff, may also be remitted or mitigated by the Secretary in accordance with the provisions of section 5294, Revised Statutes. *Ib.*

**PENALTIES—Continued.**

3. **Remission of Penalty imposed upon Vessel Clearing Foreign Port and Entering Port of United States Without Bill of Health.**—The Secretary of Commerce and Labor has no authority to remit or mitigate a penalty or forfeiture imposed upon a vessel for a violation of section 2 of the act of February 15, 1893 (27 Stat. 450), which requires a vessel to obtain a bill of health before clearing any foreign port for a port in the United States, as that matter still remains within administrative jurisdiction and control of the Secretary of the Treasury. 169.

**PETERSBURG, ALASKA.** See ALASKA.**PHILIPPINE ISLANDS.**

1. **Entry of Cigars from.**—Section 2804 of the Revised Statutes, which forbids the entry of cigars of less quantity than 3,000 in a single package, applies to cigars coming into the United States from the Philippine Islands. 77.
2. **Same.**—Cigars and cigarettes brought into the United States from the Philippine Islands are subject to the internal-revenue tax under section 5 of the tariff act of August 5, 1909 (36 Stat. 83), and internal-revenue stamps in payment of such tax are required to be affixed to the packages containing the same. *Ib.*
3. **Importation of Goods for the Army.**—Goods imported into the Philippine Islands for the use of the Army of the United States are not subject to the stamp tax imposed by section 284 of act No. 355 of the Philippine Commission as amended, as it is beyond the competency of the Philippine Government to levy a tax on articles imported for the use of the United States Government. 442.
4. **Legality of Bond Issue—Cebu, P. I.**—The issuance of bonds in the sum of \$125,000 for the purpose of providing funds for certain municipal improvements in the municipality of Cebu, P. I., when made in accordance with the provisions of the act of the Philippine Legislature, approved March 29, 1911, as herein construed, is valid. 102.
5. **Life-Saving Medals—Barac River, P. I.**—The Secretary of the Treasury is empowered by the act of January 21, 1897 (29 Stat. 494), to bestow life-saving medals for signal exertions made in saving persons from drowning in the Barac River, a nonnavigable stream of the Philippine Islands, since that river is under the jurisdiction of the United States by virtue of the sovereignty of the United States over said islands. 72.
6. **Postal Service.**—The Postmaster General has no authority to arrange a special parcel-post service or to conclude arrangements for money-order exchanges with the Philippine Islands under the power conferred upon him by sections 398 and 4028 of the Revised Statutes. 380.

\*



**PHILIPPINE ISLANDS**—Continued.

7. **Same.**—The power to negotiate and conclude money-order and parcel-post conventions or agreements with foreign governments, which shall cover the mail and money-order service between the Philippine Islands and such foreign governments, resides, not in the Postmaster General, but in the Government of the Philippine Islands. *Ib.*
8. **Status of Foreign Corporations.**—Foreign corporations may freely engage in industrial pursuits in the Philippine Islands, provided they obtain a license from the Philippine Government for that purpose. 435.
9. **Same.**—Corporations, domestic and foreign alike, may purchase or lease such amounts of real estate as may be reasonably necessary to enable them to carry out those purposes for which they were created, but are prohibited from conducting the business of buying and selling real estate, and, if they be corporations engaged in agriculture, from owning and controlling over 1,024 hectares of land. *Ib.*
10. **Same.**—Belgian corporations enjoy the same rights and advantages in the Philippine Islands as American corporations; the only distinction being that the exploration and occupation of mineral lands and the purchase of nonmineral agricultural public land is confined to citizens of the United States and of the Philippine Islands. *Ib.*

**POLOCK, ISAAC.** See DISTRICT OF COLUMBIA, 4.

**PONCE, P. R.**

MUNICIPAL BONDS. See PORTO RICO, 4, 5, 6, 7.

**PORTLAND, OREG.**

IMPROVEMENT BONDS. See POSTAL SAVINGS SYSTEM, 10.

**PORTO RICO.**

1. **Apportionment of Postal Savings Deposits Among Qualified Banks.**—When there is no bank available to receive the funds in the particular place in which a postal savings depository is located, as provided for under section 9 of the act of June 25, 1910 (36 Stat. 816), creating the Postal Savings System, the deposits should be apportioned among the qualified banks equally convenient to such locality. 258.
2. **Legality of Bond Issue.**—The issuance of bonds by the Government of Porto Rico for port improvements at San Juan, as provided by an act of the Legislative Assembly of Porto Rico, approved March 7, 1912, not being in excess of 7 per centum of the aggregate tax valuation of its property and complying in every other respect with the terms of the organic act, is legal. 497.
3. **Same.**—Issuance of bonds by Porto Rico in extension of irrigation system, not exceeding 7 per cent of the aggregate tax valuation of its property, is legal. 577.

**PORTO RICO**—Continued.

4. **Same.**—**Legality of Bond Issue.**—**The municipality of Ponce, P. R., may lawfully issue bonds** for the purpose of paying an indebtedness to the insular government and for the purchase of land and construction of a pier, as the power to issue bonds of this general character has been granted to that municipality by Congress and the Legislative Assembly of Porto Rico. 468.
5. **Same.**—**It is essential to the validity of said bonds** that the provisions of the act of the legislative assembly of Porto Rico of January 31, 1901, authorizing and regulating the issuance of bonds by the cities of Porto Rico, be substantially complied with. *Ib.*
6. **Same.**—**These bonds are made payable, principal and interest, in Porto Rico,** and in case proper notice is given by the holder thereof the place of payment may be transferred to New York City. They are transferable in Porto Rico only. *Ib.*
7. **Same.**—**The form of the bond** must be approved by the executive council of Porto Rico, as provided by section 9 of the act of January 31, 1901. *Ib.*
8. **Naturalization of Aliens—Miguel Roses Artau and Elias A. Wolff.**—A judgment of naturalization obtained in the Circuit Court of Porto Rico under section 2165 of the Revised Statutes, which has since been repealed by the act of June 29, 1906 (34 Stat. 596), can not properly at this time be questioned on the ground that the court did not have jurisdiction over the naturalization of aliens. 521.
9. **Transfer of Naval Stations.**—**Any part of the naval stations in Porto Rico may be transferred** to the government of Porto Rico under the act of June 14, 1910 (36 Stat. 467), provided it was reserved under the authority conferred by the act of July 1, 1902 (32 Stat. 731), is adjacent to the city of San Juan, and is no longer needed for purposes of the United States. 205.
10. **Same.**—**The portions of that tract of land on the Caguas Road** in the city of San Juan which were not included in the President's proclamation of August 4, 1908 (35 Stat. 2197), may be now conveyed to Porto Rico. The land, however, which was ceded to the United States by the insular government of Porto Rico in return for the portions of said tract of land conveyed by the proclamation of August 4, 1908, not having been reserved under the act of July 1, 1902, may not now be conveyed to the people of Porto Rico under the act of June 14, 1910. *Ib.*
11. **Same.**—**While the transfer to the insular government** may be made by the Secretary of the Navy, since in contemplation of law the acts of the heads of the executive departments are the acts of the President, yet it would be preferable to have the formal transfer effected by presidential proclamation. *Ib.*

**PORTO RICO**—Continued.

12. **Same.**—As to those parts of the naval stations which are not adjacent to the city of San Juan, or are otherwise not within the provisions of the act of 1910, there is no warrant of law for their formal transfer or cession. Permission, however, may be given to the Porto Rican government through a letter or instrument in the nature of a revocable license for the use of these parts of the stations and the buildings thereon and for the construction of improvements temporary in nature. But it should not be attempted to transfer their permanent control to the insular government, nor would it be proper to permit the erection of improvements that would in fact be permanent. *Ib.*
13. **Same.**—Any part or parts of the naval stations in Porto Rico no longer needed for the purposes of the Navy Department may be transferred to the control of the War Department or of any other department, either by formal Executive order or by arrangement between the Secretary of the Navy and the head of the other department. *Ib.*
14. **United States District Court—Expenses.**—The expenses of the District Court of the United States for Porto Rico should be paid from the funds of the government of Porto Rico. 553.

**POST OFFICE APPROPRIATION ACT.** See NEWSPAPERS, 1, 2, 3.

**POSTAL SAVINGS SYSTEM.**

1. **Acceptance of Dividends on Deposits.**—The statute of Indiana, under which the St. Joseph County Savings Bank, of South Bend, Ind., a depository for postal savings funds, is incorporated, provides that the net profits of savings banks shall be distributed as dividends among the depositors, but it does not authorize the payment of interest on deposits, and it is inconsistent with the laws of the State for savings banks to establish a class of depositors who shall receive both interest and dividends. 513.
2. **Apportionment of Postal Savings Deposits Among Qualified Banks.**—When there is no bank to receive the funds in the particular place in which a postal savings depository is located, as provided for under section 9 of the act of June 25, 1910 (36 Stat. 816), creating the Postal Savings System, the deposits should be apportioned among the qualified banks equally convenient to such locality. 254.
3. **Depositories—Ownership of Securities.**—It is not essential, under the postal-savings depositories act of June 25, 1910 (36 Stat. 814), that the securities taken by the board of trustees for the payment of postal savings funds shall be the property of the bank.
4. **Same.**—Where securities belonging to the directors or stockholders of a bank are pledged at their request with the board of trustees in behalf of the bank in consideration of the deposits of postal savings funds with the bank, the requirements of the act are satisfied. 266.

**POSTAL SAVINGS SYSTEM—Continued.**

5. **Same.**—It would seem advisable that every deposit of securities with the board of trustees should be made by the bank itself, always assuming that it is accompanied by assurance from the owners admitting their consent to the pledge for the consideration running from the Government to themselves, namely, the deposit to be made by the Government at their request in the bank in which they are interested. *Ib.*
6. **Duplication of Accounts.**—A person is prohibited by section 4 of the postal-savings depositories act of June 25, 1910 (36 Stat. 815), from having more than one deposit account with the postal savings system. 316.
7. **Exchange of Deposits for Postal-Savings Bonds.**—As the opening of a second postal-savings account is unauthorized, it can not be treated as a proper basis for the exchange of deposits for postal-savings bonds under the provisions of section 10 of the above-mentioned act. *Ib.*
8. **Improvement Bonds—Certain improvement bonds of the city of Tuscaloosa, Ala.,** which purport to bind that city without any reservation, are public bonds supported by the taxing power within the meaning of section 9 of the postal-savings depositories act of June 25, 1910 (36 Stat. 816).
9. **Same.—Certain other improvement bonds of the city of West End, Ala.,** which are not payable out of the general taxes of the municipality, but merely out of a special fund, are not acceptable as security for postal-savings deposits. 546.
10. **Same.—Certain special improvement bonds of the city of Portland, Oreg.,** which are not limited in their obligation to any special fund, are public bonds supported by the general taxing power of the city within the meaning of section 9 of the postal-savings depositories act of June 25, 1910 (36 Stat. 816). 335.
11. **Organization of Banks.**—A bank is “organized under National or State laws” within the meaning of section 9 of the postal-savings depositories act of June 25, 1910 (36 Stat. 816), when it is incorporated, or clothed with the essential attributes of a corporation by virtue of legislative sanction. 368.
12. **Same.**—The mere authority to transact a banking business, although granted in pursuance of State laws, carries with it no implication of organization under the State laws, irrespective of whether such authority is or is not exercised subject to State supervision and examination. *Ib.*
13. **Pledging of Loaned Securities.**—It is immaterial under the postal-savings depositories act of June 25, 1910 (36 Stat. 814), from what source the bank obtains the securities furnished the board of trustees as collateral to postal-savings deposits, provided the board takes them in pledge on a valuable consideration with no other notice than that they are being used in the exact manner authorized by the owners thereof; and hence a bank may be permitted to pledge with the board of trustees as collateral to postal-savings funds bonds loaned to it for that purpose. 333.

**POSTAL SAVINGS SYSTEM**—Continued.

14. **Same.**—When such bonds are transferred to the board of trustees by the bank in consideration of the deposit with the bank of postal-savings funds, the board acquires a good title thereto as pledgee, since said bonds are negotiable instruments and the board is a purchaser for value without notice of any flaw in the title thereto. *Ib.*
15. **Private Banks in Indiana.**—Private banks in Indiana under the legislation of 1907 may become depositories of postal-savings funds under section 9 of the act of June 25, 1910 (36 Stat. 816), as construed in the opinion of March 12, 1912 (29 Op. 368). 420.
16. **Public Building Fund Bonds of Oklahoma.**—Certain public building bonds issued by the State of Oklahoma and payable out of a trust fund which the State is pledged merely to administer are not acceptable as security for postal savings funds, as they are not supported by the taxing power within the meaning of section 9 of the postal savings depositories act of June 25, 1910 (35 Stat. 816). 451.
17. **Settlement of Accounts of Deceased Depositors.**—The Postmaster General is authorized to make regulations dispensing with administration proceedings in the settlement of accounts of deceased depositors in the Postal Savings System, provided such regulations be reasonable, adapted to the discovery of truth, and based upon the general legal principles governing the distributions of decedents' estates. 477.
18. **Same.**—Perhaps it would be well to have the regulations printed in the pass book or otherwise brought to the attention of the depositors, and it would also seem wise, out of abundant caution, to have the regulations adopted by the board of trustees. *Ib.*
19. **Wilson Township Bonds.**—Certain good road bonds of Wilson Township issued by the board of commissioners of Wilson County, N. C., under authority of law and which are payable out of taxes levied against all the property, both real and personal, contained within the limits of said township without any restrictions or limitations, may be accepted as security for deposits of postal savings funds consistently with section 9 of the postal savings depositories act of June 25, 1910 (36 Stat. 816), and with the regulations of the board of trustees. 425.
20. **Same.**—The sufficiency of any bonds offered as security for the deposit of postal savings funds, even if they fall within the class "public bonds or other securities supported by the taxing power," rests entirely in the uncontrolled discretion of the board of trustees. *Ib.*

*See also* PORTO RICO, 1.

**POSTAL SERVICE.** *See* ERIE RAILROAD CO.; OCEAN MAIL SERVICE; PHILIPPINE ISLANDS, 6, 7.

**POSTMASTER GENERAL.**

AUTHORITY TO ARRANGE SPECIAL PARCEL POST SERVICE. *See* PHILIPPINE ISLANDS, 6, 7.

AUTHORITY TO MAKE REGULATION IN SETTLEMENT OF ACCOUNTS. *See* POSTAL SAVINGS SYSTEM, 17, 18.

**PRESIDENT.**

1. **Appointments.**—The agents in the Alaska fur-seal fisheries service and the agents and inspector in the Alaska salmon fisheries service, whose positions were placed in the Division of Alaska Fisheries by the act of March 4, 1911 (36 Stat. 1439), need not be reappointed, since the mere creation of a new administrative division in which such positions are placed does not establish new offices; the new positions of agent, Alaska salmon fisheries, and of warden and deputy wardens, Alaska service, in the Division of Alaska Fisheries, should be filled by appointments made by the President, by and with the advice and consent of the Senate, as the duties of these officers are manifestly not clerical. 116.

2. **Same.**—The deputy commissioner of fisheries must be appointed by the President, by and with the advice and consent of the Senate, and where such appointment is made by the head of the department it is illegal and the incumbent's status is that of a *de facto* officer. A new appointment is not made necessary, however, merely by reason of the increase of the salary of the office. 116.

3. **Authority to Send Militia into a Foreign Country.**—The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation. 322.

INFORMATION RELATING TO NATIONAL BANKS. *See* NATIONAL BANKS, 4, 5.

PROCLAMATION. COPYRIGHT. *See* COPYRIGHT LAWS, 1.

SAME. EXCHANGE OF LANDS. *See* PORTO RICO, 10, 11.

SAME. EXPORT OF ARMS, etc. *See* ARMS AND MUNITIONS OF WAR, 6, 7, 8, 9.

SAME. 50TH ANNIVERSARY OF EMANCIPATION PROCLAMATION. *See* EMANCIPATION PROCLAMATION.

SAME. SALES OF TIMBER FROM UNALLOTTED INDIAN LANDS. *See* INDIANS, 3.

**PRILOF ISLANDS.**

NATURALIST, FUR-SEAL FISHERIES, APPOINTMENT. *See* COMMERCE AND LABOR, SECRETARY OF, 2.

PHYSICIANS, APPOINTMENT. *See* COMMERCE AND LABOR, SECRETARY OF, 2.

**PRINTED FACING SLIPS.** *See* CONTRACTS, 3.

**PROCLAMATION.** COPYRIGHT PRIVILEGES. *See* COPYRIGHT LAWS, 1.

EXCHANGE OF LANDS. *See* PORTO RICO, 10, 11.

EXPORT OF ARMS, etc. *See* ARMS AND MUNITIONS OF WAR, 6, 7, 8, 9.

50TH ANNIVERSARY OF EMANCIPATION PROCLAMATION. *See* EMANCIPATION PROCLAMATION.

SALES OF TIMBER FROM UNALLOTTED INDIAN LANDS. *See* INDIANS, 3.

**PROJECTILES.** *See* EIGHT-HOUR LAW, 19.

**PROMOTIONS.** *See* ARMY, 4.

**PUBLIC FUNDS.** *See* NAVY, 1, 2, 3.

**PUBLIC HEALTH AND MARINE-HOSPITAL SERVICE.**

**Selection of Surgeon General.**—The President in selecting a Surgeon General of the Public Health and Marine-Hospital Service is not restricted by law to the list of commissioned officers in the Medical Corps of that service. 287.

**PUBLIC LANDS.**

1. **Disposition of Reclaimed Land Formerly Covered by Mud Lake, Minn.**—Lands in Minnesota ceded to the United States by the Chippewa Indians which were formerly covered by Mud Lake but are now reclaimed by drainage should be surveyed and disposed of for the benefit of the Indians like any other lands included in the cession which have been reclaimed pursuant to the act of May 20, 1908 (35 Stat. 169), and the drainage laws of the State.
2. **Same.**—Any patents that may issue for the shore lots should be by appropriate description confined expressly to the land above the meander line. 455.
3. **Same—Public lands beneath the waters of a navigable lake** become subject to the disposition of the State wherein they lie upon and by virtue of her admission to the Union; but the question of navigability is a Federal question ultimately determinable by the Supreme Court of the United States, applying the Federal constitution. *Ib.*
4. **Same.**—The test of navigability is actual or potential utility for the purposes of commerce—Mud Lake considered and held non-navigable. *Ib.*
5. **Same.**—Public lands beneath the waters of a nonnavigable lake do not pass to the State by virtue of her admission, but are subject to be disposed of by the United States apart from the surrounding upland. *Ib.*

**PUBLIC PRINTER.** *See* GOVERNMENT PRINTING OFFICE, 1, 2.

**PUBLIC PRINTER, DEPUTY.** *See* GOVERNMENT PRINTING OFFICE, 3.

**PUBLIC WORK.** *See* EIGHT-HOUR LAW, 15.

**QUITCLAIM DEEDS.** See DISTRICT OF COLUMBIA, 5.

**RADIO COMMUNICATION.**

1. **Issuance of Licenses.**—The Secretary of Commerce and Labor has no authority under the act of August 13, 1912 (37 Stat. 302), to refuse to grant a license to a domestic corporation to operate apparatus for trans-Atlantic radio communication on the ground that the stock of the corporation is owned or controlled by foreigners. 579.
2. **Same.**—A corporation organized under the laws of the State of New York whose stock is owned by German interests can not be denied such a license until, by reciprocal arrangement with Germany, American capital is guaranteed the right of investing in and controlling corporations organized under German laws to operate coast stations in Germany for trans-Atlantic radio communication. *Ib.*

**RAILROAD LAND GRANTS.**

1. **Mineral Indemnity Selections.**—Atlantic & Pacific and Southern Pacific Grants.—Under the act of July 27, 1866 (14 Stat. 292), granting lands to the Atlantic & Pacific Railroad Co. and to the Southern Pacific Railroad Co., the grantees are entitled to 20 odd-numbered sections of land per mile on each side of the line or 40 sections per mile in all, through Territories; and 10 odd-numbered sections per mile on each side of the line, or 20 sections per mile in all, through States, extending laterally from the line of road. 124.
2. **Same.**—The railroad companies by the third proviso to section 3 of the act of July 27, 1866 (14 Stat. 295), must obtain their mineral indemnity lands from the odd-numbered sections within 20 miles from the line of road which were entered by individuals prior to the time when the rights of the companies attached, but which have since been canceled or abandoned. *Ib.*
3. **Same—Northern Pacific Land Grant.**—In selecting indemnity lands for the loss of mineral lands the Northern Pacific Railway Co. is not limited to the State in which the loss occurred. 498.
4. **Same.**—The company may select as indemnity lands within the primary limits, which at the time the grant attached were “reserved, sold, granted, or otherwise appropriated,” but which have since been relieved of that impediment and at the time of selection are unoccupied or unappropriated public lands. *Ib.*
5. **Same.**—The indemnity selection for lost mineral lands may be made within 50 miles of the line of the road. *Ib.*
6. **Same.**—Where there is a discrepancy between the printed statutes and the enrolled act the latter will control. *Ib.*

**RECESS APPOINTMENTS.** See ARMY, 3.

**RECESS PROMOTIONS.** See ARMY, 3, 4.



**RECLAMATION OF ARID LANDS.**

1. **Filing of Agreements.**—Agreements entered into by the States to reclaim arid lands pursuant to section 4 of the act of August 18, 1894 (28 Stat. 422), known as the Carey Act, are not within the purview of sections 3744 and 3745 of the Revised Statutes, and hence there is no necessity for filing copies thereof in the Returns Office of the Department of the Interior. 437.
2. **Same.**—These agreements when executed and approved by the President form a part of the records of the General Land Office and there would seem to be no reason for changing the departmental practice of filing them in that office. *Ib.*

**RECLAIMED LANDS.** *See* PUBLIC LANDS, 1, 2, 3, 5.

**REFEREE BOARD, DEPARTMENT OF AGRICULTURE.** *See* FOOD AND DRUGS ACT, 2, 3.

**REGISTRY OF VESSELS.** *See* VESSELS, 5.

**REID WRECKING CO.**

CLAIM FOR SERVICES. *See* VESSELS, 8, 9.

**RETIREMENT.** *See* ARMY, 1, 7.

**RETURN OF A CONTRACT.** *See* CONTRACTS, 4.

**RIGHTS OF WAY.** *See* FOREST RESERVES.

**RIVER AND HARBOR WORK.** *See* WORKMEN'S COMPENSATION.

**SADDLES, BRIDLES, ETC.** *See* ARMS AND MUNITIONS OF WAR, 7.

**ST. JOSEPH COUNTY SAVINGS BANK, SOUTH BEND, IND.** *See* POSTAL SAVINGS SYSTEM, 1.

**SAN JUAN, P. R.**

IMPROVEMENT BONDS. *See* PORTO RICO, 2.

**SCHOOLS.** *See* ALASKA; ATTORNEY GENERAL, 5.

**SEAMEN.**

An American seaman, disabled in the service of the vessel and who was left in a hospital at a foreign port, is entitled to medical expenses incident to a recovery from the injury and transportation back to the United States, and where these expenses are paid out of funds belonging to the United States, after notice to the owners of the vessel that they were liable for the same and demand made for payment, the owners of the vessel may be held liable therefor. 54.

*See also* PENALTIES, 1.

**SECURITIES.** *See* POSTAL SAVINGS SYSTEM, 3, 4, 5, 13, 14, 16.

**SEIZURES.**

The Secretary of the Treasury is without authority to remit or mitigate a seizure made pursuant to the provisions of subsection 7 of section 28 of the act of August 5, 1909 (36 Stat. 95), on shipments of imported frozen eggs, where the appraised value of the eggs exceeded their entered value more than 75 per cent. 261.

**SERUMS.** *See* VIRUSES.

- SHIP'S EQUIPAGE.** *See* VESSELS, 6, 7.
- SMOKELESS POWDER.** *See* EIGHT-HOUR LAW, 20.
- SMOKING OPIUM.** *See* OPIUM, 2, 3, 4.
- SOUTHERN PACIFIC RAILROAD CO.** *See* RAILROAD LAND GRANTS, 1, 2.
- STATUTORY CONSTRUCTION.** *See* CONSTRUCTION OF STATUTES.
- STEAMER JOHN B. KETCHAM 2D.** *See* VESSELS, 8, 9.
- STEAMSHIP EUROPA.** *See* VESSELS, 10.
- SUPPLIES.** *See* EIGHT-HOUR LAW, 18.
- SURGEON GENERAL.**  
SELECTION. *See* PUBLIC HEALTH AND MARINE-HOSPITAL SERVICE.
- TELEGRAPH.** *See* FOREST RESERVES.
- TELEPHONE.** *See* FOREST RESERVES.
- TIMBER.**  
FROM UNALLOTTED LANDS. *See* INDIANS, 3.
- TITLE TO LANDS.** *See* DISTRICT OF COLUMBIA, 2, 3, 4, 5.
- TORPEDOES.** *See* COMBINATIONS AND MONOPOLIES, 9.
- TOXINS.** *See* VIRUSES.
- TOY CAP PISTOLS.** *See* ARMS AND MUNITIONS OF WAR, 8.
- TRANSPORTATION.**  
OF LETTERS OUTSIDE THE MAIL. *See* ERIE RAILROAD CO.  
OF PASSENGERS INTO FOREIGN WATERS, ETC. *See* VESSELS, 11.  
PANAMA RAILROAD. *See* PANAMA, 1.
- TREASURER OF UNITED STATES.**  
BONDS. *See* OFFICIAL BONDS, 1, 2, 3.
- TREASURY, SECRETARY OF.**  
AUTHORITY TO BESTOW LIFE-SAVING MEDALS. *See* PHILIPPINE ISLANDS, 5.  
AUTHORITY TO REMIT SEIZURE. *See* SEIZURES.  
FOOD AND DRUGS ACT. *See* FOOD AND DRUGS ACT, 1.
- TRUSTS.** *See* COMBINATIONS AND MONOPOLIES.
- TUSCALOOSA, ALA.**  
BONDS. *See* POSTAL SAVINGS SYSTEM, 8.
- ULTRA VIRES TRANSACTIONS.** *See* NATIONAL BANKS, 3.
- UNITED STATES DISTRICT COURT, PORTO RICO.** *See* PORTO RICO, 14.
- VESSELS.**  
1. Clearance of Vessels—Importation of Opium not Included in Manifest.—A collector of customs has no right to refuse clearance of a vessel, used as a common carrier, because of the nonpayment of a fine imposed under section 2809 of the Revised Statutes, for bringing into the United States merchandise not included in the manifest, unless the master or owner of the vessel was consenting to the illegal act or privy thereto. 364.

**VESSELS—Continued.**

2. **Same—Enforcing Penalty.**—Where the vessel is not used as a common carrier, the Government has, by virtue of section 3088 of the Revised Statutes, a lien on the vessel for the penalty thus incurred by the master, and may enforce that lien by libel and seizure; but where the vessel is used as a common carrier, and the owner or master thereof is not a consenting party to the illegal act, or privy thereto, the only remedy appears to be an action against the master. *Ib.*
3. **A foreign tugboat clearing from Vancouver, British Columbia, with logs in tow,** some of which are destined to Anacortes, Wash., and the remainder to Bellingham, Wash., may lawfully be permitted, after arrival at Anacortes and delivery there of the logs consigned to that port, to proceed to Bellingham with the remaining logs in tow for delivery there. 572.
4. **Government Contract—Partial Payment.**—The general rule would seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments. 46.
5. **Registry and Enrollment.**—A vessel belonging to a domestic corporation is entitled to registry or enrollment, even though some stock of the company be owned by aliens. 188.
6. **Reissued Articles of Ship's Equipage Chargeable to Annual Appropriation for "Equipment of Vessels."**—Under the acts of June 25, 1910, and March 4, 1911 (26 Stat. 792, 1279), creating the naval supply account, articles of equipage of ships, which in prior fiscal years had been purchased and paid for under the appropriation "Equipment of vessels" and which had been turned into store from ships going out of commission, should be again charged against the annual appropriation for "Equipment of vessels" when they are reissued to the vessels upon their going into commission. 344.
7. **Same.**—Under said act of March 4, 1911, the Secretary of the Navy is authorized, whenever the interests of the Naval Establishment require it, to direct that "surveyed material taken from repairs made to ships or plant at navy yards and stations" and "stores turned in from ships" going out of commission should not be charged to the naval supply account, the word "materials" as used throughout the acts in question being intended to include articles forming part of a ship's equipage. *Ib.*
8. **Steamer "John B. Ketcham No. 2"—Removal from West Neebish Channel.**—The claim of the Reid Wrecking Co. against the Government for services in removing the steamer *John B. Ketcham No. 2* from the West Neebish Channel should be paid

**VESSELS**—Continued.

and that company should not be required, as a condition precedent to the payment of its claim, to bring the vessel within the jurisdiction of the United States since said vessel has been sold under appropriate judicial proceedings. 276.

9. Same.—The statute under which this claim arises makes no provision for the payment of interest, therefore none can be paid. *Ib.*

10. Steamship "Europa" Carrying Passengers into the Port of New York Without Certificate of Inspection.—The steamship *Europa*, a private vessel of Italian nationality, which was engaged in carrying passengers upon a regularly established line between the ports of the United States and European ports, sailed from the port of New York with a certificate of inspection but arrived back at New York more than 30 days after the expiration of such certificate, did not thereby violate any of the provisions of title 52, Revised Statutes, for the reason that foreign vessels are subject to inspection only when carrying passengers from the United States. 19.

11. Transportation of Passengers into Foreign Waters and Back to Port of Departure.—The transportation of passengers by foreign vessels from a port in the United States through domestic and foreign waters, sometimes touching at a foreign port, and returning them to the port of departure, is not in violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248). 318.

CONSTRUCTION OF NAVAL VESSELS. See EIGHT-HOUR LAW, 4, 5, 6, 7, 8.

LIABILITY OF OWNERS FOR HOSPITAL CHARGES. See SEAMEN. LOADING AT COLON WHARF, ENTERS UNITED STATES AS FROM FOREIGN PORT. See PANAMA, 2.

MODIFICATION OF CONTRACTS. See CONTRACTS, 1.

PURCHASE OF STRUCTURAL MATERIAL FOR VESSELS. See COMBINATIONS AND MONOPOLIES, 3, 4, 5.

REMISSION OF PENALTIES. See PENALTIES, 1, 3.

**VIRUSES, SERUMS, ETC.**

The importation or admission into the United States of viruses, serums, toxins, and analogous products, that are prepared by and sold or given away by a foreign unlicensed establishment to individuals or institutions in the United States for their use and not for sale, barter, or exchange by such individuals or institutions, is not contrary to the provisions of the act of July 1, 1902 (32 Stat. 728), regulating the sale of viruses, serums, etc. 340.

**WEST END, ALA.**

BONDS. See POSTAL SAVINGS SYSTEM, 9.

**WHITE MOUNTAIN APACHE INDIAN RESERVATION.**SALE OF TIMBER. *See* INDIANS, 3.**WHITEHEAD TORPEDOES.** *See* COMBINATIONS AND MONOPOLIES, 9.**WILLAMETTE FALLS, OREG.**

In the purchase and construction of a canal and locks around Willamette Falls, at Oregon City, Oreg., provided for by the river and harbor act of June 25, 1910 (36 Stat. 630), the appropriation authorized may be expended in the prosecution of the work, notwithstanding the total cost may exceed the amount of the appropriation. 236.

**WILSON TOWNSHIP, N. C.**GOOD ROADS BONDS. *See* POSTAL SAVINGS SYSTEM, 19.**WIRELESS TELEGRAPH.** *See* RADIO COMMUNICATION, 1, 2.**WOLFF, ELIAS A.**NATURALIZATION. *See* PORTO RICO, 8.**WORDS AND PHRASES.**

1. "Ammunition."—The practical meaning of the word "ammunition," as used in the proviso in the fortification act of June 6, 1912, under the heading of "Armament of fortifications," is much for the determination of the departments for which it is especially intended, and as this proviso is mainly for the guidance of the War and Navy Departments and those purchasing material for them, it may well be taken that the generally accepted meaning of the word in these departments was the one intended. 488.
2. "Arms and munitions of war."—The words "arms or munitions of war," within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to any American country in which conditions of domestic violence are found to exist, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. 375.
3. "Establishments."—The provisions of the act of June 30, 1906 (34 Stat. 674), in relation to the inspection of "establishments," cover all "establishments" where meat food products are prepared, wherever the meat which goes into them may have come from. 227.
4. "Formerly in free Public Library."—The provision in the legislative, executive, and judicial appropriation act of August 23, 1912, for an assistant in the division for the blind in the Library of Congress, creates a particular position but does not designate the particular person who is to fill it; the phrase "formerly in the free Public Library," is merely descriptive of the character of the duties of the position created. 532.

**WORDS AND PHRASES—Continued.**

5. "**Herein.**"—The word "herein" when employed in an act of Congress ordinarily and unless the context makes necessary a different construction means "in this act." 35.
6. "**Materials.**"—Under act of March 4, 1911 (26 Stat. 792, 1279), the Secretary of the Navy is authorized, whenever the interests of the Naval Establishment require it, to direct that "surveyed material taken from repairs made to ships or plant at navy yards and stations" and "stores turned in from ships" going out of commission should not be charged to the naval supply account, the word "materials" as used throughout the acts in question being intended to include articles forming part of a ship's equipage. 344.
7. "**Officers of the United States.**"—Deputy clerks of the district courts of the United States are "officers of the United States" within the meaning of the provision of the urgent deficiency appropriation act of August 5, 1909 (36 Stat. 118, 125), which limits the rate of premium on official bonds of officers and employees of the United States. 593.
8. "**Organized under National and State laws.**"—A bank is "organized under National or State laws," within the meaning of section 9 of the postal saving depositories act of June 25, 1910 (36 Stat. 816), when it is incorporated, or clothed with the essential attributes of a corporation by virtue of legislative sanction. 368.
9. "**Route.**"—The word "route," as used in section 1 of the act of March 3, 1891 (26 Stat. 830), means the course or way to be traveled in going from one place to another. 389.
10. "**Shall be Expended for the Purchase of Structural Steel, Ship Plates, Armor, Armament, or Machinery.**"—The provision of the naval appropriation act of March 4, 1911 (36 Stat. 1289), that no part of the money therein appropriated "shall be expended for the purchase of structural steel, ship plates, armor, armament, or machinery" from any combination or monopoly refers only to purchases made directly by the Navy Department. 44.
11. "**Such Materials or Articles as may Usually be Bought in Open Market.**"—The word "supplies" and the phrase "such materials or articles as may usually be bought in open market" are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration.
12. "**Supplies.**"—The word "supplies" and the phrase "such materials or articles as may usually be bought in open market" are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration. 534.

**WORDS AND PHRASES**—Continued.

13. "Work contemplated by the contract."—The eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract. The words "work contemplated by the contract" include the work directly and proximately in view in the contract as specifically appropriated to and destined for the Government use. 534.

**WORKMEN'S COMPENSATION.**

Where a laborer employed by the United States in the construction of river and harbor work, while off duty, went upon a bin to talk with the man emptying gravel about going home the following Sunday, and in the act of leaving, voluntarily and with no emergency for immediate action, attempted to empty a box of gravel and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment, and compensation therefor is unauthorized under the act of May 30, 1908 (35 Stat. 556). 415.

